(16,771.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 558.

JAMES W. WILSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA ON THE RELATION OF L. C. CALDWELL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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1 CALDWELL v. WILSON. } Case No. 305.

From the supreme court of the State of North Carolina.

2 NORTH CAROLINA:

In Supreme Court, September Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL *against* JAMES W. WILSON. } Petition for Writ of Error.

The above-named defendant, considering himself aggri-ved by the judgment and decision of the supreme court of North Carolina rendered December 23d, 1897, excepts to said judgment and decision and prays for a writ of error to the end that said judgment and decision may be inquired into by the Supreme Court of the United States and all errors found therein be reversed. Wherefore he prays that said writ of error be granted and a transcript of the record and proceedings and papers upon which said judgment and decision was rendered, duly authenticated, may be sent to the Supreme Court of the United States.

Raleigh, N. C., December 23d, 1897.

R. O. BURTON,
Attorney for J. W. Wilson.

3 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the supreme court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit wherein The State of North Carolina on the relation of L. C. Caldwell is plaintiff and James W. Wilson is defendant, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error has happened, to the great damage of the said James W. Wilson, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,

together with this writ, so that you have the same at Washington on the 20th day of January, 1898, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

4 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23d day of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-second.

[L. S.] N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

Allowed by—
W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

5 North Carolina Supreme Court, September Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL
against
JAMES W. WILSON.

Assignment of Errors.

And now, on this 23d day of December, 1897, comes the defendant, James W. Wilson, plaintiff in error, by his attorney, Robert O. Burton, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

First. That the supreme court erred in holding that the defendant was not removed or suspended from his office of railroad commissioner without due process of law and contrary to the fourteenth amendment to the Constitution of the United States.

Second. That the supreme court erred in holding that in the removal or suspension of the defendant he was not deprived of the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

Third. That it appears by the record in this case that the governor made certain charges against the defendant in his letter of August 24th, 1897, and cited him to appear before him on the first day of September, 1897, and show cause in writing and to make answer and proofs in writing and to be there in person or by counsel, at his election; that the defendant appeared and filed a written denial of all the charges and demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him; that said demand was refused; that the facts were not in the personal knowledge of the governor, and that the governor, without evidence and without a trial, undertook to find generally that the defendant had violated the railroad commission law in some

6 of the particulars mentioned in his letter of August 24th, 1897, set out in the complaint, and that the defendant had not

only violated the said act in the specifications set out in the said act, but that he had otherwise within the meaning and intent and words of said act become disqualified to act, and thereupon the governor undertook to suspend or remove the defendant and deprive him of his office and appointed the relator, L. C. Caldwell, to fill the same; that defendant declined to surrender his office, and thereupon this action in the nature of *quo warranto* was brought to oust him therefrom; that in the superior court the defendant filed his answer, controverting all the charges made against him, and tendered issues covering all phases of the controversy; that the trial court refused to submit the issues or any issues to the jury, but ruled that the statute and the action of the governor did not deprive the defendant of his liberties and property without due process of law, and that the plaintiff was entitled to judgment for the possession of the office on the pleadings; that the defendant duly excepted and appealed to the supreme court, and the ruling and decision of the trial court was sustained and the judgment affirmed.

The defendant says said ruling and decision is erroneous and in violation of the fourteenth amendment to the Constitution of the United States.

Fourth. That the defendant is a judge of a court of record under the laws of North Carolina, and no judge or other officer is liable to removal or suspension by the governor. Moreover, the constitution of North Carolina, art. 4, sec. 30, confers the power of removal of judges on the General Assembly for mental and physical inability, which this defendant claims is a prohibition against removal by the governor or legislature for other causes. The supreme
7 court holds that by the action of the governor the defendant is not deprived of the equal protection of the laws, and the defendant says that the said ruling and decision are erroneous and in violation of the fourteenth amendment to the Constitution of the United States.

Wherefore the said James W. Wilson prays that the judgment of the supreme court of North Carolina be reversed.

Raleigh, N. C., December 23, 1897.

R. O. BURTON,
Defendant's Attorney.

8 UNITED STATES OF AMERICA, *ss:*

To the State of North Carolina and L. C. Caldwell, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the 20th day of January, 1898, pursuant to a writ of error filed in the clerk's office of the supreme court of North Carolina, wherein James W. Wilson is plaintiff in error and The State of North Carolina on relation of L. C. Caldwell is defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness William T. Faircloth, chief justice of the supreme court of North Carolina, this 23d day of December, 1897.

W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

The foregoing papers endorsed: Filed on Thursday, the 23rd day of December, 1897, at 7.10 p. m., in the supreme court of N. C. clerk's office, together with copies of the writ of error for the State of North Carolina and L. C. Caldwell, plaintiff relator.

9 In the Supreme Court of the United States.

JAMES W. WILSON, Plaintiff in Error,
against
THE STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL, Defendant in Error.

I, O. J. Carroll, United States marshal for the eastern district of North Carolina, do hereby certify that on the 24th day of December, 1897, in my district aforesaid, I served the citation herein on L. C. Caldwell by delivering to him a true copy thereof, and on the 29th day of December, 1897, in my district aforesaid, I served said citation on the State of North Carolina by delivering a true copy thereof to Daniel L. Russell, governor of said State.

Witness O. J. Carroll, United States marshal for said district, this 29th day of December, 1897, in Raleigh, N. C.

O. J. CARROLL,
U. S. Marshal,
By J. C. CARROLL, *D. M.*

Fees, $4.00, paid by plaintiff in error.

10 [Endorsed:] J. W. Wilson *v.* The State of N. C. Marshal's certificate.

11 *Bond on Writ of Error.*

Know all men by these presents that we, James W. Wilson, as principal, and J. W. Wilson, Jr., A. E. Wilson, and J. S. Carr, as sureties, are held and firmly bound unto the State of North Carolina and L. C. Caldwell in the full and just sum of four thousand dollars, to be paid to the said State of North Carolina and L. C. Caldwell or either of them, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 6th day of December, 1897.

Whereas lately, at a term of the supreme court of North Carolina, in a suit depending in said court between The State of North Carolina on relation of L. C. Caldwell, as plaintiff, and James W. Wilson, as defendant, a judgment was rendered in favor of the plaintiff and against the defendant, and the said defendant, James W. Wilson,

having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation having issued, directed to the said plaintiffs, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, on a day named in said citation: Now, the condition of the above obligation is such that if the said James W. Wilson shall prosecute said writ to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JAS. W. WILSON. [SEAL.]
J. W. WILSON, JR. [SEAL.]
A. E. WILSON. [SEAL.]
J. S. CARR. [SEAL.]

12 —— ——, being duly sworn, says that he is worth the sum of three thousand dollars over and above the amount of his homestead and personal property exemptions and his indebtedness.

J. W. WILSON, JR. [SEAL.]

Sworn to and subscribed before me this Dec. 6, 1897.

[Seal of Burke Superior Court.]

P. W. PATTON, *C. S. C.*

A. E. Wilson, being sworn, says that he is worth the sum of three thousand dollars over and above the amount of his homestead and personal property exemptions and his indebtedness.

A. E. WILSON.

Sworn to and subscribed before me this 10th day of December, 1897.

[Seal of the Notary.]

R. S. TRAVIS,
Notary Public.

J. S. Carr, being duly sworn, says that he is worth the sum of ten thousand dollars over and above his exemptions by law and his indebtedness.

J. S. CARR.

Sworn to and subscribed before me this December 14, 1897.

[Seal of the Notary.]

W. T. SMITH,
Notary Public.

Approved December 23, 1897.

W. T. FAIRCLOTH,
Chief Justice of North Carolina.

Endorsed: Bond filed on Thursday, Dec. 23, 1897, at 7.10 p. m., in the supreme court of N. C. clerk's office.

13 *Transcript of Record to Supreme Court of North Carolina.*

IREDELL COUNTY:

In the Superior Court.

STATE OF NORTH CAROLINA on the Relation of L. C. CALDWELL *against* JAMES W. WILSON. } Summons for Relief.

State of North Carolina to the sheriff of Burke county, Greeting:

You are hereby commanded to summon James W. Wilson, the defendant above named, if he be found within your county, to be and appear before the judge of our superior court, at the court to be held for the county of Iredell, at the court-house in Statesville on the 9th Monday after the 1st Monday of September, to wit: the 8th day of November, 1897, and answer the complaint, a copy of which is herewith served, and let said defendant take notice that if he fail to answer to the said complaint within that time, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 5th day of October, 1897.

H. V. FURCHES,
Clerk of Superior Court, Iredell County.

STATE OF NORTH CAROLINA, *Iredell County.*

In the Superior Court.

STATE OF NORTH CAROLINA on the Relation of L. C. CALDWELL *against* JAMES W. WILSON. } Bond.

We acknowledge ourselves bound unto James W. Wilson, the defendant in this action, in the sum of two hundred dollars, to be *a* void, however, if the plaintiff, L. C. Caldwell, shall pay the defendant all such cost as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 5th day of October, A. D. 1897.

L. C. CALDWELL. [SEAL.]
M. E. RAMSEY. [SEAL.]

M. E. Ramsey, being duly sworn, deposes and says that he is worth the sum of $200, over and above all debts, liabilities, homestead and personal exemptions.

M. E. RAMSEY.

Subscribed and sworn to before me October 5, 1897.

W. G. LEWIS, *J. P.*

Received October 9th, 1897. Served October 9th, 1897, by reading the within summons to James W. Wilson and delivering him a copy of the summons and complaint. Fee paid, $1.20.

THOMAS M. WEBB,
Sheriff Burke County.

NORTH CAROLINA, EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
RALEIGH, N. C., *Oct.* 4, 1897.

STATE on the Relation of L. C. CALDWELL
against
JAS. W. WILSON.

Application having been made to me by L. C. Caldwell for leave to bring an action in the name of the State upon the relation of the said L. C. Caldwell against Jas. W. Wilson, in the superior court of Iredell county and others to try the title to the office of railroad commissioner; and satisfactory security having been tendered me under section 608 of the Code to indemnify the State against
14 all costs and expenses which may occur in consequence of the bringing of such action:

Now, therefore, leave is hereby granted to the said applicant to bring the said action in the name of the State upon the relation of the said applicant against the said Jas. W. Wilson.

ZEB. V. WALSER,
Attorney General.

NORTH CAROLINA,
Iredell County.

Superior Court, November Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL,
Railroad Commissioner,
vs.
JAMES W. WILSON.

Complaint.

The plaintiff complains and alleges:

1st. That the relator, L. C. Caldwell, is a citizen and tax-payer of Iredell county, North Carolina.

2nd. That the defendant was duly elected railroad commissioner by the legislature of 1893 for the term of six years from the time of his election until expiration of his term.

3rd. That as the relator is informed and believes *that* on the 24th day of August 1897 His Excellency Daniel L. Russell, governor of North Carolina, addressed and sent to the defendant James W. Wilson a communication in the following words and figures, to wit:

STATE OF NORTH CAROLINA,
EXECUTIVE DEPARTMENT,
RALEIGH, *Aug.* 24, 1897.

To James W. Wilson, Esq., member of the railroad commission of North Carolina.

SIR: By section first of the railroad commission act, ratified the 5th day of March, 1891, it is made the duty of the governor to suspend from office any railroad commissioner who shall be the holder of "any stock or bond of any railroad company, or be the agent or employee of any such company, or have any interest in any way in such company or in case any one of them shall be disqualified to act." It is alleged that you are the joint owner with Col. A. B. Andrews, the first vice-president of the Southern railroad, general political manager of the same for North Carolina, of a certain piece of hotel property known as Round Knob, situated on the line of the said railroad; that said hotel property is worth little or nothing except as a hotel and that it is worthless for this purpose except when designated and patronized by the Southern railroad as an eating-house for their passenger trains; that said hotel property has been unoccupied and unused for any purpose for several years past and has brought in no revenue to you as one of its owners; that it is impossible for you to use, rent or lease said property unless some understanding, agreement or contract could be made with the Southern Railroad Company to designate and patronize the said hotel as a railroad eating-house; that you and the other owner or owners of said hotel property have secured some agreement, understanding or contract from the Southern Railroad Company to abandon other eating-houses and designate Round Knob as an eating-house; and that by virture of said arrangements with said railroad that you have been able to lease said hotel property to S. Otho Wilson, or to his mother through the said Wilson, for profit.

It is further alleged that you have a son in the employment of the Southern Railroad Company at Morganton; that he was appointed to this place by the Southern Railroad Company at your request, and that he was appointed over others entitled to the place by promotion under the practice of the company, and that this was done for your accommodation and at your request.

These allegations have been made to me by many persons, and I think publication of them has been made in the public press. If they or the material substance of them be true—as to which I am expressing no opinion—then the questions to be determined are as follows:

First. Have you acquired any interest in any way in such company in violation of law?

Second. Have you become disqualified to act as a fair judge or commissioner?

Under the law the governor has not only a right but is required to suspend a railroad commissioner who commits a breach of the statute which has been cited, and this he may do, as in other cases of executive removals, without notice to the party interested; but

I shall not pass judgment or decide this matter until you have had a full opportunity to be heard by way of denial or explanation or justification or other defense. You will therefore please show cause in writing on or before Wednesday, the 1st day of September, 1897, at the executive office in Raleigh, why you should not be suspended from your said office and a report thereof made to the next General Assembly according to law. On the return day of this notice, you will please make answer and proofs in writing, and be there in person, or by counsel at your election.

DANIEL L. RUSSELL, *Governor.*

To which said James W. Wilson in obedience to said order made reply as follows:

"AUGUST 30TH, 1897.

To Daniel L. Russell, governor of North Carolina.

SIR: Your favor of the 25th, citing me to appear before you on Wednesday, the 1st day of September, and reply in writing to certain rumors or charges from parties unknown to me, and show cause why I should not be removed from the responsible position of chairman of the railroad commission, agreeable to section 1 of the act creating this commission, was duly received.

In obedience thereto I herewith submit this, my answer to each charge in the order as given in your letter. It is drawn by myself, and possibly free from the elegant diction which a lawyer would have imparted, but I feel sure it will carry conviction to an impartial mind.

1st. It is not true, as alleged, that I am the joint owner with Col. A. B. Andrews, vice-president of the Southern railway and general political manager of the same for North Carolina, in a certain piece of hotel property known as Round Knob.

2nd. It is not true that said hotel property is worthless for that purpose except when designated and patronized by the Southern Railway Company as an eating-house for their passenger trains.

3rd. It is not true that said hotel property has been unoccupied and unused for any purpose for several years past and brought in no revenue to me as one of its owners.

4th. It is not true that it was impossible to use, lease or rent said property unless some understanding, agreement or contract could be made with the Southern railway to designate and patronize the said hotel as a railroad eating-house.

5th. It is not true, as alleged that I with the other owner or owners of said property have secured an agreement, understanding or contract from the Southern Railway Company to abandon other eating-houses and designate Round Knob as an eating-house, and by virtue of said agreements with said railroad that I have been able to lease said hotel property to Otho Wilson, or his mother, through the said Wilson, for profit.

6th. It is untrue, as further alleged, that I have a son in the employment of the Southern Railway Company at my request and that he was appointed over others entitled to the place by promotion under the practice of the company, and this was done for my

accommodation and at my request. I hereby denounce these allegations as made to you by many persons as false, and demand the proof.

16 In explanation I will say that about 1881 Col. Andrews and myself built this hotel at a cost of about $8,000. It is not worthless, as stated, but is a most convenient and beautiful hotel, with thirty rooms, closets and baths on each floor, and was leased and run as a hotel for several years with no meals supplied to passengers. The property has not been unoccupied for years, as charged, but on the contrary was leased up to last year, at an annual rental of $500 per annum, to a responsible party, with no understanding of any kind with the Southern Railway Company.

In a casual conversation with Mr. Otho Wilson, my recollection is that I spoke of this very desirable property, which was then vacant, the lease of Friscard & Co. having expired, and saying that the superintendent of the road had sent me word that if some one would open and keep a good house he would make it a dinner-house; the hotel at Hickory was then closed, and my impression is that Asheville was not then a regular eating-house, but of this I am not sure. Mr. Wilson remarked that his mother was looking around for a boarding-house, and that possibly this might suit her, and he would go up and examine the property. This he did, and on his return expressed himself as greatly pleased, but said the former lessee had left the property in bad condition and very dirty. I was aware of this, and replied that, of this account, if his mother would put the place in good repair she could have it the first year free of rent—this much for the profit as charged; the message to me about the eating-house was not intended for Mr. Otho Wilson or his mother, but was sent before Mr. Wilson or his mother ever thought of it, or intended for any person I could get who would keep a first-class table. The management of the property was left entirely to me, and my recollection is that I never mentioned the matter to Col. Andrews until the trade was consummated through Mr. Otho Wilson for his mother.

The land upon which the Round Knob property was located belonged to John Malone, Col. Crockford and myself. This party owed a debt of about $3,000 to R. H. Brown, of McDowell county. I am the only one of the parties now living, and was alone responsible for the debt. For the hotel itself I paid $6,000, Col. Andrews $3,000. Col. Andrews' interest being about one-quarter of the hotel, with about ten acres of land adjoining. Before the receipt of your letter I had no idea that any man in North Carolina seriously considered that my owning a piece of property jointly with Col. Andrews, and held jointly by us since 1881, and now rented by a widow, which being in addition to a summer resort was a dinner station for the passenger trains of the Southern railway, would ever in any way be so construed as to make me in any form under obligations to the Southern railway.

Finding, however, by your letter that there were parties who believed or pretended to believe that this was indirectly a violation of the act, I promptly, under the advice of friends, to avoid 'even the

pearance of evil,' deeded my individual interests in the property R. H. Brown for his claim of about $3,000, about the value at the sent depreciation of the property. This was done agreeably to tion 1 of the act to avoid any criticism by even the captious as to conduct as railroad commissioner, feeling no uneasiness that ur fairness as a judge should be so biased as to decide that with showing made you could with any pretention of justice, remove from the office now held by the unanimous support of the legisure of North Carolina; for this unprecedented compliment I have ver before had an opportunity to return thanks.

As to the charges about my son, I will say that he is no minor, charged, but is twenty-seven years old, and is one of the oldest ployees on the division upon which he is stationed. About ven years ago the agent at Morganton resigned. My son was his ief clerk, and in the very line of promotion. V. E. McBee, general perintendent of the Seaboard air line, was at that time superinident of that division; he had previously promised my son, as was told, that he would promote him at the first opportunity. Mr. McBee kept his promise. I have no recollection of it, but it is more than probable that I spoke to Capt. McBee in his half. It would have been a most unnatural father who would ave done otherwise. I believe this covers the entire bill of charges. ut there are other matters of rumor, not in your letter, but calcuted to prejudice your mind. I consider it but simple justice to ate the facts as to each one. It is charged that when the Seaboard stem was endeavoring to give the people cheap rates I interfered. he following is a copy of orders in the case. See Report of the ommissioners to the Governor, page 213: 'It appears from press eports that reduced rates have been again ordered to be put in ffect from certain points outside of this State to certain points ithin, clearly causing a discrimination in violation of the long and hort haul clause of the act creating the commission. Justice to he local business of the State requires us to take prompt action. It therefore ordered by the commission that all roads doing business n the State of North Carolina shall reduce their local tariffs to assenger and freight in the same proportion as has been done by hem on their through business.'

It was my opinion then that our own folks should have at least s good treatment as outsiders. I drew the order and would do so gain under similar circumstances. It is also charged on the streets hat the Seaboard system was unfairly dealt with by me in the matter f their proposed change of line at Gaston. The facts are, that the rder as given was drawn by Capt. McBee, general superintendent f the Seaboard air line, and in his own writing in this office. By his request, the board adopted it as their order, believing it to e a fair solution of the matter. At least the Seaboard should be topped from objecting. The charges as made against me are, in ny opinion, so frivolous that they would have been passed unnoticed had they not been considered as of serious importance by ne who holds the exalted position that you do. It is also charged hat my influence during the session of the legislature was exerted

to prevent a reduction of rates. The last annual report submitted by the commission, with no difference of views by the commissioners, gave the rates of freight and passengers considered by us as just and reasonable. In support of our views a comparison of the rates of all the States in the Union was made and published. We were sworn officers and made this report with regard to the solemnity of our oaths. During the session of the legislature the members of the commission were invited to appear before the joint committee on railroads and give their views as to the justness of the rates now in force. Two of us responded. I, for one, was given a most respectful hearing by the committee. In my argument the report of the commission was sustained by facts and figures. Nothing since has been shown to convince me that I was wrong. The charge that it was argued by me before the committee that to recommend a change of rates would be reflecting on the commission is not warranted by the facts; nothing of the kind was ever alluded to by me—in this I am sure that I will be sustained by the committee.

In justice to myself I will say that I never entered the halls of the legislature during its session, or expressed my views except when solicited to do so by its committee.

These facts have been intended to be given without feeling and in a most respectful manner, and I trust they will be so received by you.

In addition to the facts, I will say that the State of North Carolina has a constitution which you and I have sworn to support. This constitution and the laws as expounded guarantee protection to its humblest citizen. To a lawyer of your acknowledged ability, it may appear presumptious for me to call to your attention sections 4 and 5, article 6, of the Statute constitution, which reads as follows:

'The following classes of persons shall be disqualified for offices: First, all persons who shall deny the being of Almighty God; second, all persons who shall have been convicted of treason, perjury or of any infamous crime,' etc. See also article 4, sec-
18 tion 31. Also article 1, section 19, of Bill of Rights. This I will copy in full, as it is regarded by every freeman as a bulwark of liberty. It reads as follows: 'In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable.'

See also the 14th amendment of the Constitution of the United States, which forbids any State to deprive a citizen of life, liberty or property without due process of law. See also decisions of our supreme court: Hoke *v.* Henderson, 4 Devereux; Cotton *v.* Ellis, 7 Jones; Bunting *v.* Gates, 77 N. C.; Branson *v.* Turner, 70 N. C.; Howerton *v.* Tate, 70 N. C. Legislature cannot confer on an executive judicial powers. See Cooley on Constitutional Limitations. Act 1891, making railroad commission a court of record."

And on the 23rd day of September, 1897, the said governor of North Carolina issued and sent to the defendant the following communication and order:

EXECUTIVE DEPARTMENT,
RALEIGH, N. C., *September* 23, 1897.

To James W. Wilson, Esq., chairman of railroad commission.

SIR: Take notice that, after due investigation and consideration, I am convinced that you have violated the railroad commission law in some of the particulars mentioned in my letter to you August 24th, 1897, and that you have not only violated said act in the specification set out in said act, but that you have otherwise, within the meaning and intent and words of said act become disqualified to act.

Now therefore, in obedience to the duty imposed upon me by said act of the assembly I do hereby suspend you from the office of railroad commissioner and chairman of said commission, such suspension to continue until the question of your removal or restoration shall be determined by a majority of the General Assembly in joint session. The fact of your suspension together with the reasons therefor and the evidence documents and information connected therewith will be reported to the next General Assembly.

You will further take notice that under and by virtue of the powers conferred and duties imposed by law upon the chief executive I have appointed L. C. Caldwell, Esq., of the county of Iredell, to fill the vacancy created by your suspension.

Inasmuch as you are understood to deny the power of the executive to suspend you from office as provided by the statutes, I have requested Mr. Caldwell to make demand upon you for the possession of the office and upon your refusal, to bring action therefor to the end that the title to the office may be judicially determined.

(Signed) D. L. RUSSELL, *Governor.*

To which communication and order the said governor received the following reply:

RALEIGH, N. C., *September* 24, 1897.

To D. L. Russell, governor.

SIR: Your of the 23rd inst. is hereby acknowledged. In reply I will say that I shall disregard your order to suspend, but will continue to do business at the old stand until removed by a tribunal other than a self-constituted "star chamber."

(Signed) JAS. W. WILSON,
Chairman Railroad Commission.

4th. And therefore the relator avers and so charges on information and belief that on the said 23rd day of September, 1897, his excellency, Daniel L. Russell, governor of the State of North Carolina, in pursuance of the power and authority vested in him by section 1, chapter 320, of the Laws of the State of North Carolina, passed by the General Assembly at its session of 1891, ratified the 5th day of March, 1891, and in execution of duty devolved upon him by the said act suspended the said James W. Wilson from the said office

of railroad commissioner and as chairman of said commis-
19 sion. That on the said 23rd day of September, 1897, the said D. L. Russell, governor of North Carolina as aforesaid, appointed the relator, L. C. Caldwell, a railroad commissioner and chairman of the railroad commission, to fill the vacancy caused by the suspension of the said James W. Wilson from said office of commissioner and chairman of said commission from the said 23rd day of September, 1897, to continue until the next General Assembly, shall determine the removal of said James W. Wilson or until your successor is elected and qualified according to law.

5th. That the plaintiff relator duly qualified as railroad commissioner and chairman of said commission by taking the oath prescribed by law before David M. Furches, one of the justices of the supreme court of North Carolina, which oaths were duly deposited in the office of the secretary of state.

6th. That the plaintiff relator, since his appointment and qualification as aforesaid, and before the institution of this action, demanded of the said James W. Wilson that he, the said James W. Wilson, should vacate the said office of railroad commissioner, and surrender the same to the relator, and the said James W. Wilson refused to vacate and surrender the said office to the relator in words and figures, to wit:

SEPTEMBER 28TH, 1897.

Hon. L. C. Caldwell, Statesville, N. C.

DEAR SIR: Your favor of the 25th making your demand for the office of railroad commissioner, together with all the papers, records, rights and privileges thereto belonging, was duly served upon me by the sheriff of Burke county. In reply will say that I most respectfully decline to accede to your request.

Yours very truly, JAMES W. WILSON,
Chairman Railroad Commission.

7th. That the defendant James W. Wilson, notwithstanding the suspension from the office of railroad commissioner and chairman of said commission by the governor of North Carolina as hereinbefore set forth, refuses to vacate the same, and does now unlawfully usurp intrude into, hold and exercise the said office of railroad commissioner and chairman of said commission, and does now prevent and hinder the relator from performing the duties of said office.

8th. That said office of railroad commissioner is an office of trust and profit under the laws of North Carolina.

9th. That leave to bring this action has been given by the attorney general of said State, which leave is attached hereto.

Wherefore the plaintiff demands judgment:

1st. That the defendant has been suspended from his office of railroad commissioner and chairman of said commission according to law.

2nd. That the defendant be adjudged guilty of unlawfully holding and exercising said office, and that he be fined $2,000, in pursuance of the statute.

3rd. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant, and is entitled to hold and exercise the said office.

4th. That the defendant be ousted from, and the relator inducted into, said office.

5th. For such other and further relief as may be just and right and for costs of this action.

W. J. MONTGOMERY,
ARMFIELD & TURNER,
A. D. COWLES, *Attorneys.*

NORTH CAROLINA, }
Iredell County. }

L. C. Caldwell, being duly sworn before me, says that he is the relator herein; that the facts set forth in the foregoing complaint are true as of his own knowledge, except as to those matters stated upon information and belief, and as to them he believes it to be true.

L. C. CALDWELL.

Sworn to and subscribed before me, this 9th day of October 1897.
H. V. FURCHES, *C. S. C.*,
By G. B. NICHOLSON, *D. C.*

Filed Oct. 11th, 1897.

H. V. FURCHES, *C. S. C.*,
By G. B. NICHOLSON, *D. C.*

20 NORTH CAROLINA, }
Iredell County. }

Superior Court, November Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL *against* JAMES W. WILSON. } Answer.

The defendant, answering the complaint, says:

1. That section 1 thereof is admitted.

2. That section 2 thereof is admitted. Defendant's term of office began April 1, 1893, and ends April 1, 1899.

3. That section 3 of the complaint is admitted.

4. That section 4 of the complaint is denied. But defendant admits that the governor undertook or attempted to suspend or remove the defendant from his said office of railroad commissioner and designated the plaintiff's relator, L. C. Caldwell, to fill the vacancy which he had attempted to create.

5. That the allegations in section 5 of the plaintiff's complaint are not true. He admits that said Caldwell has taken the oath prescribed by law for railroad commissioner.

6. The defendant admits section 6 of the complaint, except that he does not admit the appointment and qualification of said Caldwell any further than he has hereinbefore admitted the same.

7. That he denies section 7 of the complaint, but he admits that he refuses to vacate his office of railroad commissioner and to surrender the same to the relator. The defendant is advised that his suspension was illegal and that he is still entitled to discharge the duties of his office.

8. Sections 8 and 9 of the complaint are admitted.

9. That the General Assembly of North Carolina at its session of 1891 under the authority of the constitution of the State, article 4, sections 2, 12 and 30, passed an act constituting a railroad commission with the powers of a court, which was ratified the fifth of March, 1891, and under said act the defendant was elected a member thereof at the session of 1893 for the term of six years; and on the ninth of March, 1891, the General Assembly of North Carolina passed an act declaring "that the railroad commission elected at this session of the General Assembly and their successors in office be and they are hereby created and constituted a court of record inferior to the supreme court and shall be known as the board of railroad commissioners, and as such shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in the act creating such railroad commission."

10. That the act ratified March 5, 1891, in section 1 thereof, provides, "that said commissioners shall not jointly or severally or in any way be the holder of any stock or bonds or the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any commissioner shall as distributee or legatee or in any other way, have or become entitled to any stock or bonds or interest therein of any such company he shall at once dispose of the same, and in case any commissioner shall fail in this or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office and to report the fact of his suspension together with the reason therefor to the next General Assembly, and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the General Assembly shall determine that the commissioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified as hereinbefore provided, but if the General Assembly shall determine that the suspended commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled
21 to the salary for the time he is so engaged, but a commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next General Assembly: Provided, that no person is eligible as such commissioner who shall have been an attorney of any such company within twelve months next preceding his election to such office;" but the defendant avers, being so advised, that said provisions are unconstitutional and void.

11. That as appears by the complaint the said Daniel L. Russell,

governor, preferred the charges contained in his communication of August 24, 1897, which *is* set out in section 3 of complaint. The defendant appeared before the said governor at the day fixed and filed a written denial of said charges with only an affidavit from V. E. McBee as follows: "In 1893 I was general superintendent of the Western North Carolina railroad, and during the said year appointed the said James W. Wilson, Jr., station agent at Morganton, and in making said appointment did so without consultation or conference with Mr. Wilson's father. J. W. Wilson, Jr., had several years before appointed station agent served as clerk in the said office and proved himself competent to fill the agency." Defendant also filed testimonials from citizens of Morganton showing the business capacity and fitness of said J. W. Wilson, Jr., for the position of agent at that place. And thereupon the defendant demanded of the said governor that the evidence against him be produced, and that he have an opportunity to confront his accusers and cross-examine the witness. This was refused, the governor stating that he had no power to subpœna witnesses.

12. That notwithstanding the denials of the defendant and the affidavit in support thereof, the said governor without evidence and without a trial, undertook to find generally that the defendant had violated the railroad commission law in some of the particulars mentioned in his letter of August 24th, 1897, and that the defendant had not only violated the said act in the specifications set out in said act, but that he had otherwise, within the meaning and intent and words of said act, become disqualified to act. Thereupon the said governor, without a more specific finding, undertook to suspend the defendant and deprive him of his said office.

13. The defendant denies that he is the joint owner with Col. A. B. Andrews, the first vice-president of the Southern railroad, of the Round Knob hotel. He for a valuable consideration sold and conveyed the same between the date of the governor's letter of August 24th, 1897, and August 30th, 1897, by deed to R. M. Brown, as he was entitled to do under the provisions of said act of the General Assembly.

14. That the defendant denies that the said hotel property is worthless as a hotel except when designated and patronized by the Southern railroad as an eating-house for their passenger trains.

15. That the defendant denies that the said hotel property has been unoccupied and unused for any purpose for several years past, and has brought in no revenue to defendant. Up to 1896 it was under lease for five years to Meusett and Frisard at an annual rental of $500. This lease expired some time in the fall or winter of 1896. While three years' rent is still due by them it is perfectly good and collectable, and the same is now in suit.

17. That the defendant denies that it is impossible to use, rent or lease said property unless some understanding, agreement or contract can be made with the Southern railroad to designate and patronize the said hotel as a railroad eating-house.

18. That the defendant denies, except as stated herein, that he

and the other owner or owners of said hotel property secured any agreement, understanding or contract from the Southern Railroad Company to abandon other eating-houses and designate Round Knob as an eating-house, and that by virtue of said agreement with said railroad he was able to lease said hotel property to S. Otho Wilson, or to his mother through the said Wilson, for profit. The facts are fully stated in the defendant's letter of August 30th, 1897, set out in the complaint.

19. That the defendant denies that his son, who is now twenty-seven years of age, was appointed agent at Morganton of the Southern railroad over others entitled to the place by promotion under the practice of the company, and that this was done for his accommodation. He was in the very line of promotion and was appointed in 1893 by V. E. McBee, former superintendent, in pursuance of a previous promise, as defendant is informed and believes, on account of a vacancy in the office in Morganton. His said son was chief clerk to the agent and was appointed on his resignation. Defendant at first thought he may have spoken to Mr. McBee in favor of his son, but on more careful inquiry and reflection is convinced he did not do so, and he therefore denies that he said anything about it — said McBee.

20. That defendant acquired the Round Knob hotel property in 1881. The hotel was built in 1881, or thereabouts, and has been a railroad eating-house at divers times since its erection.

21. The defendant denies that he has acquired any interest in any way in the Southern Railroad Company in violation of law.

22. The defendant denies that he has become disqualified to act as a fair judge or commissioner.

23. That under the laws of North Carolina the defendant has a property in his office, and he demands to have the charges preferred against him tried by a jury in this action.

24. That by the constitution of the State of North Carolina, article 6, sections 1, 2 and 3, it is provided that every male person born in the United States, and every male person who has been naturalized, twenty-one years old or upward, who shall have resided in the State twelve months next preceding the election, and ninety days in the county in which he offers to vote, shall be deemed an elector and eligible to office, except all persons who shall deny the being of Almighty God, and all persons who shall have been convicted of treason, perjury or of any other infamous crime since becoming citizens of the United States, or of corruption or malpractice in office, unless such person shall have been legally restored to the rights of citizenship.

25. That this defendant is in every way qualified to hold office under the requirements aforesaid.

26. That the defendant is advised, and so avers, that any provision of the railroad commission act, chapter 320, of the Acts of the General Assembly of North Carolina, passed at the session of 1891, which prescribe other and different qualifications for the office of railroad commissioner than those laid down by the said provisions of the constitution, are unconstitutional and void.

27. That the board of railroad commissioners is a court of record, and the commissioners are judges under and by virtue of article 4, section 12, of the constitution of the State by which it is provided: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, but the General Assembly shall allot and distribute that portion of this power and jurisdiction, which does not pertain to the supreme court, among the other courts prescribed in this constitution, or which may be established by law in such manner as it may deem best, provide also a proper system of appeals, and regulate by law, when necessary, the method of proceeding, in the exercise of their powers, of all courts below the supreme court, so far as the same may be done without conflict with other provisions of this constitution."

28. That by article 4, section 30, of the State constitution, it is further provided: "In case the General Assembly shall establish other courts inferior to the supreme court the presiding officers and clerks thereof shall be elected in such manner as the Gen-
23 eral Assembly may, from time to time, prescribe, and they shall hold their offices for a term not exceeding eight years."

29. That by article 4, section 31, of the State constitution it is further provided, "Any judge of the supreme court or of the superior court and the presiding officers of such courts inferior to the supreme court as may be established by law may be removed from office for mental or physical inability upon a concurrent resolution of two-thirds of both houses of the General Assembly. The judge or presiding officer against whom the General Assembly may be about to proceed shall receive notice thereof accompanied by a copy of the causes alleged for his removal at least twenty days before the day on which either house of the General Assembly shall act thereon."

30. That the alleged causes of removal set up by the governor are such as apply to no other judges or presiding officers of courts or any other public officers in the State, and the governor has no power to remove or suspend any other judge or presiding officer of courts or any other officer not appointed by him. Wherefore the defendant says the statute and the said action of the governor deprive him of the equal protection of the laws, and are in violation of the fourteenth amendment of the Constitution of the United States, and this defendant expressly claims the protection of said amendment.

31. That, as appears by section 3 of the complaint, the governor cited this defendant before him to answer the charges preferred against him. This defendant fully answered, and generally and specifically denied the charges. Thereupon the defendant demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him. This was refused and no witness or other evidence was produced; and thereafter the governor made his decision, by which he attempted to remove the defendant till the meeting of the General Assembly, early in January, 1899. The defendant submits that this action was without a hearing and without evidence to support it, without any trial and without any right of appeal. Wherefore he says the said action deprives him of his

liberty and property without due process of law and is in direct conflict with the fourteenth amendment to the Constitution of the United States, and the defendant expressly claims the protection of said amendment.

32. That he submits to the court whether by the action of the governor aforesaid the privileges and immunities of defendant as a citizen of the United States have been abridged in violation of the fourteenth amendment to the Constitution of the United States, and if so he expressly claims the protection of said amendment.

33. That the defendant is advised that the General Assembly had no power to confer upon the governor the right of removal or suspension, nor to confer upon itself the power thereafter to pass upon the question of removal or restoration, nor to add to the qualifications for holding office. And the defendant further submits that the matters and things charged against him, and which he fully denies, do not come within the provisions of the act of the General Assembly and do not warrant the action of the governor.

34. The defendant submits, being so advised, that the action of the governor was illegal and void and the defendant is entitled to continue in the exercise of the duties of his office.

Wherefore the defendant prays judgment that he go without day and recover of the plaintiff his costs of action.

A. BURWELL,
JNO. D. SHAW,
JNO. GRAY BYNUM,
SPIER WHITAKER,
T. N. HILL,
R. O. BURTON,
Attorneys for Defendant.

24 James W. Wilson, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

JAS. W. WILSON.

Sworn to and subscribed before me this 29th day of October, 1897.

H. E. LITCHFORD, *N. P.*

Filed November 6th, 1897.

H. V. FURCHES, *C. S. C.*

STATE OF NORTH CAROLINA, }
Iredell County. }

Superior Court, November Term, 1897.

STATE on Relation of L. C. CALDWELL }
v. } Amendment to Answer.
JAMES W. WILSON. }

The defendant, by leave of the court, amends section 15 of answer by inserting in lieu of all after the word defendant, in line 3 thereof: In the year 1891 the defendant sold and conveyed said property to

the Carolina Investment Company, a corporation under the laws of this State; and on the 18th day of April, 1893, said company leased it to Stephen Mieusett and Emil Frisard for five years, beginning May 1st, 1893, and ending May 1st, 1898, at the following rental: $250.00 per year for the first two years; $300.00 for the third year; $400.00 for the fourth year, and $500.00 for the fifth year, payments to be made quarterly. About the — day of ——, 1893, the said company, wishing to reconvey said property to the defendant, and not having registered its deed, surrendered it to the defendant, and surrendered the property to him, upon the agreement that he would recognize the lease to Mieusett & Frisard. In the fall or winter of 1896 said Mieusett & Frisard abandoned the property and it was leased to Mrs. Mary Wilson about the — day of January or February, 1897. While Mieusett & Frisard are in arrears for two or three years' rent it is perfectly good and collectable, and is now in suit.

JAS. W. WILSON.

J. W. Wilson, being duly sworn, says the foregoing answer is true of his own knowledge, except as to allegations therein made on information and belief, and as to these matters, he believes it to be true.

JAS. W. WILSON.

Sworn to and subscribed before me this November 8th, 1897.

H. V. FURCHES, *C. S. C.*

Filed November 8th, 1897.

H. V. FURCHES, *C. S. C.*

NORTH CAROLINA, }
Iredell County. }

Superior Court, November Term, 1897.

Be it remembered, that at a superior court began and held on the 9th Monday after the 1st Monday in September, 1897, for the county of Iredell, his honor, A. L. Coble, judge, present and presiding, when and where the following proceeding was had:

* * * * * * *

STATE OF NORTH CAROLINA on the Relation of L. C. CALDWELL }
v. }
JAMES W. WILSON. }

Court takes a recess until 9.30 o'clock Tuesday morning, November 9, 1897.

ALBERT L. COBLE,
Judge Presiding.

STATE OF NORTH CAROLINA on the Relation of L. C. CALDWELL
v.
JAMES W. WILSON.
} Now being Argued by Counsel.

Court takes a recess until 9.30 o'clock Wednesday morning, November 10, 1897.

ALBERT L. COBLE,
Judge Presiding.

25 STATE *ex Rel.* L. C. CALDWELL
v.
JAMES W. WILSON.
} Issues.

The defendant tendered the following issues and demanded a trial by the jury:

1. Is the plaintiff entitled to the office of railroad commissioner?
2. Does the defendant unlawfully intrude into, hold and exercise the office of railroad commissioner and chairman of said commission?
3. Has the defendant acquired any interest in any way in the Southern Railway Company in violation of law?
4. Has the defendant become disqualified to act as a fair judge or commissioner, or has he become in any way disqualified to act?
5. Did the defendant prior to September 1, 1897, sell and convey for a valuable consideration the Round Knob hotel to R. M. Brown?
6. Did the defendant demand of the governor that the evidence against him be produced and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?
7. Was said demand refused?
8. Was any evidence produced?

The court refused to submit the issues to the jury and the defendant excepted.

The relator moved for judgment upon the pleadings; which motion was granted and the defendant excepted.

Motion for new trial. Motion overruled. Defendant excepted.

NORTH CAROLINA,
Iredell County.

Superior Court, November Term, 1897.

STATE on Relation of L. C. CALDWELL
vs.
JAMES W. WILSON.
} Judgment.

This cause coming on to be heard at this term of the court before his honor, A. L. Coble, judge, presiding, upon the motion of plaintiff's counsel for judgment upon the pleadings, and the court being of the opinion that the plaintiff is entitled to recover, it is therefore considered and adjudged by the court:

First. That the defendant Jas. W. Wilson has been duly sus-

pended from his office of railroad commissioner and chairman of said commission, and is unlawfully holding and exercising said office.

Second. That the relator L. C. Caldwell has been duly appointed to fill the vacancy caused by the suspension of said James W. Wilson from said office.

Third. That the defendant James W. Wilson be ousted from said office of railroad commissioner and that the relator L. C. Caldwell be inducted into said office, and that the relator L. C. Caldwell recover of said defendant and the sureties on his bond the costs of this action, to be taxed by the clerk of this court.

ALBERT L. COBLE,
Judge Presiding.

Appeal.

Recorded on Minute Docket No. 10, page 247.

Appeal by defendant to the supreme court. Notice of appeal waived. Appeal bond fixed at $25. Supersedeas bond fixed at $200.

26 NORTH CAROLINA, *Iredell County.*

Superior Court, November Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL *against* JAMES W. WILSON.

Statement of Case on Appeal.

Action in the nature of *quo warranto*, tried at November term, 1897, at Iredell superior court, before Coble, J.

At the conclusion of the reading of the pleadings the defendant tendered the following issues and demanded a trial by jury:

1. Is the plaintiff entitled to the office of railroad commissioner?
2. Does the defendant unlawfully intrude into, hold and exercise the office of railroad commissioner and chairman of said commission?
3. Has the defendant acquired any interest in any way in the Southern Railway Company, in violation of law?
4. Has the defendant become disqualified to act as a fair judge or commissioner, or has he become in any way disqualified to act?
5. Did the defendant, prior to September 1st, 1897, sell and convey for a valuable consideration the Round Knob hotel to R. M. Brown?
6. Did the defendant demand of the governor that the evidence against him be produced and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?
7. Was said demand refused?
8. Was any evidence produced?

Thereupon the plaintiff moved for judgment upon the complaint and answer. The defendant here claimed that such motion was irregular, and that the plaintiff should either demur or go to trial before the jury. His honor then, by consent, heard argument both upon the right to a jury trial and upon said motion for judgment.

During the argument the defendant contended, among other things, that the Statute Laws of North Carolina, session of 1881, chapter 320, section 1, and the action of the governor set out in the pleadings, deprived him of the equal protection of the laws, and deprived him of his office without due process of law, as set out in the answer, and therefore the statute and said action of the governor were in violation of the fourteenth amendment to the Constitution of the United States, and he expressly claimed the protection of said amendment. These contentions were disallowed, and the defendant excepted. Exception 1.

Exception 2. The court refused to submit the issues tendered, or any issues, and the defendant excepted.

Exception 3. The court further ruled that the plaintiff was entitled to judgment upon the pleadings. Defendant excepted.

Exception 4. The defendant moved for a new trial for the foregoing alleged errors. Motion overruled, and the defendant excepted.

Exception 5. Thereupon judgment was rendered in favor of the plaintiff as set out in the record. Defendant excepted and appealed to the supreme court. Notice waived in open court. Appeal bond fixed at $25 and filed and approved. Supersedeas bond fixed at $200 and filed and approved.

A. BURWELL,
JOHN D. SHAW,
JOHN GRAY BYNUM,
B. F. LONG,
SPIER WHITAKER,
T. N. HILL,
R. O. BURTON,
Attorneys for Defendant.

27 We hereby accept service of this case on appeal, and hereby approve the same as the case on appeal to the supreme court. Nov. 22, 1897.

AVERY,
ARMFIELD & TURNER,
MONTGOMERY,
COWLES,
Attorneys for Plaintiff.

NORTH CAROLINA, }
Iredell County. }

Superior Court, November Term, 1897.

STATE OF NORTH CAROLINA on Relation of L. C. CALDWELL }
v. }
JAMES W. WILSON. }

Know all men by these presents: that we, James W. Wilson, as principal, and W. E. Walton and James W. Wilson, Jr., as sureties, are held and firmly bound unto the State of North Carolina and L. C. Caldwell in the penal sum of twenty-five dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators.

Sealed with our seals and dated this the 10th day of November, 1897.

The condition of this obligation is such that, whereas judgment has been rendered in this action in favor of the plaintiffs and against the defendant, and defendant has appealed from judgment:

Now therefore, if the said defendant shall pay all costs that may be recovered against him on such appeal, then this obligation to be void, otherwise to remain in full force and effect.

JAS. W. WILSON. [SEAL.]
W. E. WALTON. [SEAL.]
J. W. WILSON, JR. [SEAL.]

NORTH CAROLINA, }
Burke County. }

W. E. Walton and J. W. Wilson, Jr., personally appeared before me this day and first being duly sworn, did depose and say, each for himself, that he is worth the sum of fifty dollars over and above his exemptions by law and his indebtedness.

This 10th day of November, 1897.

P. W. PATTON, *C. S. C.*

[Seal of Burke Superior Court.]

This bond is accepted and approved by me. This November 11, 1897.

H. V. FURCHES, *C. S. C.*

NORTH CAROLINA, }
Iredell County. }

Superior Court.

I, H. V. Furches, clerk of the superior court for Iredell county, hereby certify the foregoing to be a true and perfect copy of the proceedings in the superior court of the foregoing entitled case on appeal to the supreme court as complete, as the same remains on file and of record in my office.

Witness my hand and official seal, this the 22d day of November, 1897.

H. V. FURCHES,
Clerk Superior Court, Iredell County,
By G. B. NICHOLSON, *D. C.*

[Seal of Iredell Superior Court.]

28 Entries of record.—Appeal docketed November 23, 1897; motion of appellee (under rule 13) to advance the cause allowed November 25 in the following opinion:

Motion to Advance the Cause Made by Plaintiff.

A. C. Avery for plaintiff; R. O. Burton for defendant.

Per curiam: This case was tried below since the first day of the present term of this court. If the appeal had not been docketed here till the call of causes from that district at the next term of this court it would have been in time. Rule 5. But the same rule provides that it may be docketed at this term, and the court has often held that if by complying with the statutory provisions as to time in settling cases the appeal gets here at this term before the expiration of the time for docketing cases from that district, it stands regularly for argument at this term. Avery *vs.* Pritchard, 106 N. C., 344 (at bottom of p. 346); Porter *vs.* Railroad, *ibid.*, 478; State *vs.* Deyton, 119 N. C., 881. Here, by observing the statutory regulations, the appeal has gotten here after that district has been passed, and hence is not entitled to be heard as a right, but being a case affecting the title to public office, it comes within rule 13, and the court may set it down for argument. This was done under similar circumstances in Houghtalling *vs.* Taylor at this term, which involved the title to the office of county commissioner, and was set for hearing some weeks after the call of the district to which it belonged. Like the case before us, it was tried below after the beginning of the present term of this court. The appellant's case on appeal was accepted by appellee on November 22, and filed in the clerk's office that day. The Code, sec. 551, then makes it the duty of the clerk to send up the transcript within 20 days (State *vs.* Deyton, 119 N. C., 880), though in civil cases he is not required to do so unless his fees therefor are paid (Baily *vs.* Brown, 105 N. C., 127; State *v.* Nash, 109 N. C., 822), but if the clerk sends it up at
29 once instead of taking the whole 20 days, or does not stand on his right to exact his cost in advance, the appellant cannot complain, and the case is regularly here.

The motion of appellant to put the case off the docket has therefore neither merit nor precedent to sustain it, and in view of the importance of the case to the public the appellee's motion is granted, and it will stand for argument on Saturday, December 4. If the call of causes from the 10th district has not then been closed this case will be called on the Monday following. Motion allowed.

Entries of record.—Case set down for hearing on Saturday, December 4, 1897; argued Dec. 4th. The following opinions and judgment handed down on Dec. 23, about 4.30 p. m.:

30 N. C. Supreme Court, Iredell Co.

STATE *ex Rel.* L. C. CALDWELL
vs.
JAMES W. WILSON, Appellant. } No. 305.

R. O. Burton, J. D. Shaw, T. N. Hill, J. C. L. Harris, Armistead Burwell, and John G. Bynum, for appellant.

A. C. Avery, Armfield, Turner & Cowles, and W. J. Montgomery, for appellee.

DOUGLAS, *J.*:

This is an action, in the nature of *quo warranto*, brought to try the title to the office of railroad commissioner. The defendant was suspended by the governor under the provisions of section 1 of chapter 320 of the Laws of 1891, known as the railroad commission act, and the plaintiff appointed to fill the vacancy so created. The part of the act now under consideration is as follows: "Said commissioners shall not be jointly or severally or in any way be the holder of any stock or bonds or be the agent or attorney or employee of any such company or have any interest in any way in any such company, and shall so continue during the term of his office, and in case any commissioner shall, as distributee or legatee or in any other way, have or become entitled to any stock or bonds or interest therein of any such company he shall at once dispose of the same, and in case any commissioner shall fail in this or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office and to report the fact of his suspension, together with the reason therefor, to the next General Assembly, and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the General Assembly shall determine that the commissioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified, as hereinbefore provided, but if the General Assembly shall determine that the suspended commissioner shall not be removed from his office,
31 then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to the salary for the time he is so engaged, but the commissioner who is suspended shall be allowed the salary during his suspension in case he should be reinstated by the next General Assembly."

The following facts appear from the record: On the 24th day of August, 1897, the governor wrote to the defendant calling his attention to the said act, reciting certain allegations as to the defendant's connection with the Southern Railway Company, and requiring the defendant to show cause, in writing, on or before the first day of

September, 1897, why he should not be suspended from office and a report thereof made to the next General Assembly.

On the 30th day of August, 1897, the defendant filed with the governor his written answer, among other defences denying the power of the governor to suspend him, and alleging the unconstitutionality of that portion of the railroad commission act authorizing such suspension.

On the 23rd day of September, 1897, the governor notified the defendant in writing that after due investigation and consideration he was convinced that the defendant had violated the railroad commission law in some of the particulars mentioned in his letter of August 24th, and that the defendant had not only violated said act in the specifications set out in said act, but that the defendant had otherwise within the meaning and intent and words of said act become disqualified to act, and that therefore he, the governor, did suspend the defendant from the office of railroad commissioner and chairman of said commission, and did appoint thereto the relator Caldwell.

The defendant, on September 24th, replied to the governor as follows: "Sir: Yours of the 23rd inst. is hereby acknowledged. In reply I will say that I shall disregard your order to suspend,
32 but will continue to do business at the old stand until removed by a tribunal other than a self-constituted 'star chamber.'" The relator qualified at once and demanded of the defendant the possession of the said office, together with all its records, which was refused by the defendant.

Thereupon the relator brought this action to recover said office and filed his complaint, fully setting out his cause of action. The defendant answered, alleging that the governor had no power to suspend him; that if such power existed the governor had attempted to exercise it in an arbitrary and unlawful manner, without giving him the fair hearing to which he was entitled by law; that the part of the railroad commission act authorizing such suspension was unconstitutional, inasmuch as it imposed additional and unusual qualifications for said office and interfered with the independent tenure of a judicial officer and deprived him of his property in said office "without due process of law," and that his suspension, in manner and substance, was in violation of the fourteenth amendment to the Constitution of the United States. At the conclusion of the reading of the pleading the defendant tendered the following issues and demanded a trial by jury:

1. Is the plaintiff entitled to the office of railroad commissioner?

2. Does the defendant unlawfully intrude into, hold, and exercise the office of railroad commissioner and chairman of said commission?

3. Has the defendant acquired any interest in any way in the Southern Railway Company in violation of law?

4. Has the defendant become disqualified to act as a fair judge or commissioner, or has he become in any way disqualified to act?

5. Did the defendant prior to September 1, 1897, sell and
33 convey for a valuable consideration the Round Knob hotel to R. M. Brown?

6. Did the defendant demand of the governor that the evidence against him be produced, and that he have an opportunity to confront his accusers and cross-examine the witnesses against him?

7. Was said demand refused?

8. Was any evidence produced?

Thereupon the plaintiff moved for judgment upon the complaint and answer. The defendant here claimed that such motion was irregular, and that the plaintiff should either demur or go to trial before the jury. His honor then, by consent, heard argument, both upon the right to a jury trial and upon said motion for judgment. The defendant's exceptions were as follows: "During the argument the defendant contended, among other things, that the statute, Laws of North Carolina, session of 1881, chapter 320, section 1, and the action of the governor set out in the pleadings, deprived him of the equal protection of the laws, and deprived him of his office without due process of law, as set out in the answer, and therefore the statute and said action of the governor were in violation of the fourteenth amendment to the Constitution of the United States, and he expressly claimed the protection of said amendment. These contentions were disallowed and the defendant excepted. Exception 1.

Exception 2. The court refused to submit the issues tendered or any issues, and the defendant excepted.

Exception 3. The court further ruled that the plaintiff was entitled to judgment upon the pleadings. The defendant excepted.

Exception 4. The defendant moved for a new trial for the foregoing alleged errors. Motion overruled and the defendant excepted."

Thereupon judgment was rendered in favor of the plaintiff relator as follows: "First, that the defendant, James W. Wilson, has been duly suspended from his office of railroad commissioner and chairman of said commission, and is unlawfully holding and exercising said office.

34 Second. That the relator, L. C. Caldwell, has been duly appointed to fill the vacancy caused by the suspension of said James W. Wilson from said office; third, that the defendant, James W. Wilson, be ousted from said office of railroad commissioner, and that the relator, L. C. Caldwell, be inducted into said office, and that the relator, L. C. Caldwell, recover of said defendant and the sureties on his bond the costs of this action, to be taxed by the clerk of this court." The defendant excepted to this judgment and appealed to this court.

The first exception cannot be sustained, as we are utterly unable to see any Federal question whatever involved in this action. The office of railroad commissioner, from which the defendant has been suspended, is an office existing solely under the constitution and laws of this State and created to administer the railroad commission act. It has no recognition in the laws of the United States, does

not interfere with interstate commerce, and is concerned solely in domestic affairs and internal trade. The defendant was not deprived of his office without due process of law. He was cited to appear and answer certain charges, and he did appear and filed an answer. The written notice of the governor, which was admittedly received and acted upon by the defendant, was in effect a citation, and, under the circumstances, had all the force of a summons. The only object of a summons is to bring the defendant into court by giving him legal notice, and if he voluntarily appears, without limiting his appearance, he is held to waive a summons and is as completely in court as if it had been served. The court, or any other tribunal having jurisdiction of the subject-matter, has thereafter complete jurisdiction of the person. Jones *vs.* Penland, 19 N. C., 358; Hyatt *vs.* Tomlin, 24 N. C., 149; Duffy *vs.* Averitt, 27 N. C., 455; Middleton *vs.* Duffy, 73 N. C., 72; Wheeler *vs.* Cobb, 75 N. C., 21; Etheridge *vs.* Woodley, 83 N. C., 11; Penniman *vs.* Daniel, 95
35 N. C., 341; Roberts *vs.* Allman, 106 N. C., 391. In State *vs.* Jones, 88 N. C., 683, 685, this court has said: "The object of *process* is to give notice and an opportunity to make defence to an action. The *scire facias* furnished this notice and the sureties submitted to the jurisdiction and resisted the demand for judgment. A defendant may appear without process and his appearance dispenses with process, since its purpose is to bring him into court and he is in court when he answers and defends the action." That this rule is by no means peculiar to this State will be seen by a reference to the Encyclopedia of Pleading and Practice, vol. 2, p. 639.

What is "due process of law" is generally difficult to define, but we think in the case at bar the defendant has no cause to complain on that score. As the protection of the Constitution of the United States is invoked, we deem it best to omit the numberless authorities in the different State reports and confine ourselves on this point to the decisions of that court, essentially supreme wherever its jurisdiction attaches, and where alone the decisions of this court can ever be called in question.

The case of Murray's Lessee *vs.* The Hoboken Land & Improvement Co., 18 How., 272, was an action of ejectment in which the defendant claimed title to certain lands under a sale made by the United States marshal by virtue of a distress warrant issued by the solicitor of the treasury. It was held that such a warrant of distress was not in conflict with the Constitution of the United States and was "due process of law," and that the action of the executive power in issuing the warrant was conclusive evidence of the facts recited in it and of the authority to make a levy, citing Prigg *vs.* Pennsylvania, 16 Pet., 621; U. S. *vs.* Nourse, 9 Peters, 8; Randolph's Case, 2 Brock., 447; U. S. *v.* Nourse, 4 Cranch C. C., 151; U. S. *vs.* Bullock, cited 6 Pet., 485. The court further says: "Thus
36 it has been repeatedly decided in this class of cases that upon their trial the acts of executive officers, done under the authority of Congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title," citing Foley *vs.* Harrison, 15 Howard, 433; Burgess *vs.* Gray, 16 How., 48. "It is

true also that even in a suit between private persons to try a question of private right the *action of the executive power upon a matter committed to its determination by the Constitution and laws* is conclusive," citing Luther *vs.* Borden, 7 Howard, 1; Doe *vs.* Braden, 15 Howard, 635, and cited in Walker *vs.* Sauvinet, 2 Otto, 93; Davidson *vs.* New Orleans, 6 Otto, 102; Springer *vs.* U. S., 12 Otto, 586, 594; *Ex parte* Wall., 107 U. S., 290; Hilton *vs.* Merritt, 110 U. S., 107; Hurtado *vs.* Cal., 110 U. S., 528, 542.

In the case at bar there can be no question of the right of the governor to appoint the plaintiff if a vacancy legally existed. Foster *vs.* Kansas, 112 U. S., 201, 204. The only question really at issue is the legality of the removal of the defendant, and in this view the State of North Carolina is the real party in interest, as it is her act, through her chief executive, of which the defendant complains. The State has surely as much interest in having her laws properly administered by officers of her choice in every respect qualified for their duties as the General Government can have in the collection of its taxes; and we can see no reason why the action of the governor in suspending the defendant from office in strict accordance with the provisions of a statute which we hold to be constitutional is not fully as much "due process of law" as was the sale of real estate under the warrant of distress, so held in Murray *vs.* Hoboken, *supra.* Under the same authority we feel fully justified in holding that the action of the chief executive of this State, certainly an officer of higher relative rank and greater dignity
37 than a mere solicitor of the treasury, is equally conclusive upon a matter committed to his determination by the constitution and laws of this State. It is at least of equal dignity with a tax-sale certificate, whose recitals are held to be evidence *prima facie* as to all and conclusive as to many of the facts therein alleged. De Treville *vs.* Smalls, 98 U. S., 517, 524.

The defendant has not been denied access to the courts. In fact he did not attempt to appeal from the action of the governor nor seek the aid of the courts, but forcibly retained possession of an office from which he had been rightfully suspended, and forced the *plaintiff* to seek redress in this action. The governor, in his notification of suspension to the defendant, distinctly recognized the right of the defendant to have its legality tested in the courts, and made no attempt to dispossess him. The plaintiff has sought possession only "by the law of the land," as shown by the bringing of this action.

In The Bank of Columbia *vs.* Okely, 4 Wheat., 235, it was held that a party may waive his right to trial by jury by giving a note, payable at a bank, the charter of which authorizes collection by summary process. The defendant may well be deemed to have waived his right to a trial by jury, if any such right he ever had, by accepting office under a statute which expressly provided that he might be suspended by the governor without reference to a jury.

38 In Murray *vs.* Hoboken, *supra*, the court also held, "That the auditing of the accounts of a receiver of public monies

may be, in an enlarged sense, a judicial act must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the militia under the act of 1795 (12 Wheat., 19), or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power that they involved the exercise of judgment upon law and fact," citing U. S. *vs.* Ferreira, 13 How., 40.

It may be urged that a distress warrant for the collection of taxes was held to be "due process of law" because such proceeding was in accordance with the common and statute law of England; but so also was the suspension of a public officer.

We see no error in the trial of the action in the court below, and we affirm its judgment after a full hearing of the defendant's appeal.

This much at least is "due process of law." Morley *vs.* Lake Shore R. Co., 146 U. S., 162. Due process of law does not necessarily imply in all cases the right of trial by jury. If it did, the equitable jurisdiction of the Federal courts would practically be annulled. The
records of this court show, what is common knowledge, that
39 in the recent reorganization of a great railway system, mortgages involving millions of dollars were foreclosed in the circuit court of the United States and the stockholders deprived of every vestige of their property without any suggestion of a jury.

In Walker *vs.* Sauvinet, 92 U. S., 90, the court (Waite, C. J.) says: "*All questions arising under the constitution of the State alone are finally settled by the judgment below.* We can consider only such as grow out of the Constitution of the United States. * * * A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship which the States are forbidden by the fourteenth amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the States is regulated by the *law of the State.*" In Leeper *vs.* Texas, 139 U. S., 462, 467, it was held "that whether statutes of a legislature of a State have been duly enacted in accordance with the requirements of the constitution of such State is not a Federal question, and the decision of State courts as to what are the laws of the State is binding upon the courts of the United States," citing South Ottowa *vs.* Perkins, 94 U. S., 260, 268; Post *vs.* Supervisors, 105 U. S., 667; Norton *vs.* Shelby County, 118 U. S., 425, 440; Railroad Co. *vs.* Georgia, 98 U. S., 359, 366; Baldevin *vs.* Kansas, 129 U. S., 52, 57. "That law, in its regular course of administration
through courts of justice, is due process, and when secured
40 by the law of the State the constitutional requirement is satisfied, and that due process is so secured by laws operating on

all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributed justice," citing Hurtado *vs.* Cal., 110 U. S., 516, 535; *In re* Kemenler, 136 U. S., 436, 449; Caldwell *vs.* Texas, 137 U. S., 692; see also Giozza *vs.* Tierman, 148 U. S., 657; Duncas *vs.* Mo., 152 U. S., 377; Missouri, &c., R. Co. *vs.* Mackey, 127 U. S., 205; Railroad Co. *vs.* Herrick, 127 U. S., 210; State *v.* Muse, 4 Dev. & Bat., 319; State *v.* Chambers, 93 N. C., 600; State *v.* Moore, 104 N. C., 714.

In Hurtado *vs.* Cal., *supra*, in which the meaning of the phrase "due process of law" is elaborately discussed, it was held that the words "due process of law" in the 14th amendment to the Constitution do not necessarily require an indictment by a grand jury in a prosecution by a State for murder, and that a conviction upon an information for murder in the first degree and a sentence of death thereon was not without due process of law, and was therefore not in violation of the constitutional provision. McNulty *vs.* Cal., 149 U. S., 645; Vincent *vs.* Cal., *ibid.*, 648.

In Munn *vs.* Illinois, 94 U. S., 113, 134, the Chief Justice, delivering the opinion of the court, says: "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process, but the law itself as a rule of conduct may be changed at the will or even at the whim of the legislature unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed and to adapt it to the changes of time and circumstances."

41 In Davidson *vs.* New Orleans, 96 U. S., 97, 105, Justice Miller, for the court, says "that it is difficult, if not impossible, to frame a definition of the constitutional phrase without due process of law at once perspicuous, comprehensive, and satisfactory," but that "it is not possible to hold that a party has, without due process of law, been deprived of his property when, as regards the issues affecting it, he has by the laws of the State a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." And citing Murray *vs.* Hoboken, *supra*, he further says: "An exhaustive judicial inquiry into the meaning of the words 'due process of law,' as found in the fifth amendment, resulted in the unanimous decision of this court that they do not *necessarily* imply a regular proceeding in a court of justice or after the manner of such courts."

The origin, intent, and scope of the thirteenth and fourteenth amendments to the Constitution of the United States are fully and ably discussed in the Slaughter-house cases, 16 Wallace, 36, but as no reasonable extract would do justice to the opinion, it can properly be cited only as a whole.

42 In Missouri *vs.* Lewis, 101 U. S., 22, 31, it is said that "the fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same

remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury and on the other side no such right. Each State prescribes its own modes of judicial proceeding."

In *Ex parte* Wall., 107 U. S., 265, a rule was served upon the petitioner by the United States district judge, without any previous affidavit and upon mere hearsay information, to show cause why he should not be disbarred from practicing as an attorney for taking part in a lynching. The respondent filed a written answer denying the charge and excepting to the jurisdiction of the court. After the examination of one witness and hearing the argument of counsel, the court overruled the exceptions and made an order prohibiting the respondent from practicing at the bar of said court until a further order. On petition for mandamus it was held that the proceeding was regular and was due process of law, and that it was not a
43 *criminal* proceeding and not intended for punishment, but to protect the court from the official ministration of persons unfit to practice as attorneys therein. The proceeding in that case was certainly much more summary and less regular than in the case at bar, while the avowed object was the same. The defendant herein was not suspended by the governor as a punishment for any crime, as he was not charged with crime, but simply with a legal disqualification. The object of his suspension pending a legislative determination was to prevent the danger and scandal of having important official duties performed by one legally disqualified. The railroad commission was constituted by the legislature in obedience to a strong popular demand, and the people have a right to require that the men charged with the grave duty of deciding between them and the great transportation companies, which practically control the commerce of the country, should be absolutely free from the slightest suspicion of interest or bias. Such a requirement is based upon the highest principle of public policy and is no more unreasonable than to say that a clerk or sheriff must give bond for the faithful performance of his duties, that an executor or trustee cannot buy at his own sale, and that a judge shall not sit in his own case.
44 Such provisions are not uncommon. A remarkable instance may be found in the act of August 13, 1888 (25 Statutes at Large U. S., 433), which reads as follows:

"SECTION 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall *hereafter* be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member."

It is no crime to be related to a judge of the United States, nor can it be any reflection upon the personal character of such relative, and yet it is made by law an absolute disqualification for office.

The object of the law is clearly not to punish one who has committed no offence, but to relieve the judges from any temptation to appoint incompetent officials and to secure to the people in the selection of their agents the best judgment of the courts.

45 As to the equal protection of the laws guaranteed by the Constitution of the United States, it is well settled that special legislation is not objectionable where it is made to apply equally and without unjust discrimination to all who may be affected by it. The fourteenth amendment does not prohibit legislation limited as to objects or territory, but merely that all persons subjected to it shall be treated alike under like circumstances and conditions. Hayes *vs.* Missouri, 120 U. S., 68; Railroad Co. *vs.* Mackey, 127 U. S., 205; Lowe *vs.* Kansas, 163 U. S., 81, 88.

In Walston *vs.* Nevin, 128 U. S., 578, 582, the court says: "And wherever the law operates alike on all persons and property similarly situated equal protection cannot be said to be denied;" citing Wurts *vs.* Hoogland, 114 U. S., 606; Railroad Co. *vs.* Richmond, 96 U. S., 521, 529. The remedy for abuse is in the State courts, for, in the language of Mr. Justice Field in Mobile *vs.* Kimball, "this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation."

In Giazza *vs.* Tiernan, 148 U. S., 657, 651, the court says: "Irrespective of the operation of the Federal Constitution and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a State except those imposed by its written constitution."

In Duncan *vs.* Missouri, 152 U. S., 377, it was held that the privileges and immunities of citizens of the United States protected by the fourteenth amendment are such privileges and immunities as arise out of the nature and essential character of the Federal Government, and are granted or secured by the Constitution of the United States. Miller on the Constitution, 662; Presser *vs.* Illinois, 116 U. S., 252.

46 In the case of Kennard *vs.* Louisiana, 92 U. S., 480, the plaintiff in error was summarily removed from the office of associate justice of the supreme court of Louisiana, its court of last resort, by a mere rule of court. The plaintiff took out a writ of error asserting that he was deprived of his office without due process of law, in violation of the fourteenth amendment to the Constitution of the United States. The opinion of the court, delivered by Chief Justice Waite, without dissent, and remarkable equally for its clear exposition of the law and admirable condensation, affirmed the judgment for the following reasons: "The question before us is not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the State courts. *Our authority does not extend beyond an examination of the power of the courts below to proceed at all.* * * *

It will thus be seen that the act relates specially to the judges of the courts of the State and to the internal regulations of a State in respect to its own officers. * * * He had an opportunity to be

heard before he could be condemned. This was 'process,' and when served it was sufficient to bring the incumbent into court and to place him within its jurisdiction. In this case it is evident from the record that the rule was made, and that it was in *some form* brought to the attention of Kennard, for on the return day he appeared. At first, instead of showing cause why he refused to vacate his office, he objected that he had not been properly cited to appear, but the court adjudged otherwise. He then made known his title to the office. In other words, he showed cause why he refused to vacate. This was, in effect, that he had been commissioned to hold the office till the end of the next session of the senate, and that time had not arrived. Upon this he asked a *trial by jury.*
47 This the court *refused*, and *properly*, because the law under which the proceedings were had provided in terms that there should be no such trial. * * * A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act. The remedy provided was certainly speedy, but it could only be *enforced* by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but *he was in fact heard*, both in the court in which the proceedings were originally instituted and, upon his appeal, in the highest court of the State."

I have italicised the words peculiarly operating upon the case at bar. If an inferior court of the State of Louisiana can, by virtue of a statute of that State, upon a mere rule issued upon a *prima facie* case created by said statute, *remove* from office a justice of its highest constitutional court, we cannot see why the chief executive of this State, acting under express authority of a statute and in strict accordance with its terms, cannot *suspend* a member of an inferior administrative court. At least such action affects only the internal policy of North Carolina when dealing with its own officers, and should be judged by its constitution and laws alone.

We have fully considered the first exception, not only from its Federal relation, but also from its important bearing upon the validity of the act under our own constitution, which provides that "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property *but by the law of the land.*" Therefore, if we were of opinion that the defendant had been deprived of his property in the office "without due process of
48 law"—that is, such process as is due to the peculiar circumstances of his case by the law of the land—it would be our duty to at once reverse the judgment of the court below. In going over the ground covered by this exception we have necessarily been compelled to say much that is applicable to the other exceptions, and which will not be repeated.

The second exception to the refusal of the court to submit the issues tendered, or any issues, is practically directed to the denial of a trial by jury. This, we think, was properly refused, as there were

no disputed facts before the court. It is not denied that the governor notified the defendant to appear and answer; that the defendant did so appear and answer; that the governor subsequently suspended the defendant, giving him written notice of said action, and appointed the relator; that the relator duly qualified, demanded possession of the office, was refused by the defendant, and brought suit.

There was absolutely nothing to go to the jury unless the court went behind the action of the governor, which, we think, could not be reviewed by the court. The suspension by the governor is not a final determination of the defendant's rights, which must ultimately be passed on by the legislature, sitting somewhat in the nature of a court of impeachment. If it should determine that the defendant had been suspended without just cause, he would be at once reinstated and be entitled to his full pay from the time of his suspension. The duty of suspension was imposed upon the governor from the highest motives of public policy, to prevent the danger to the public interests which might arise from leaving such great powers and responsibilities in the hands of men legally disqualified. To leave them in full charge of their office until the next bien-
49 nial session of the legislature or pending litigation which might be continued for years would destroy the very object of the law. As the governor was therefore by the very letter and spirit of the law required to act and act promptly, necessarily upon his own findings of fact, we are compelled to hold that such official action was, under the circumstances, due process of law. Even if it were proper, the governor would have no power to direct an issue like a chancellor.

Section 19 of article I of our Constitution provides that: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolable," and yet from the remotest times it has been held that this right did not apply to equitable proceedings, and that is the determination of many matters of fact the intervention of a jury was neither necessary nor possible. Take, for instance, applications for receivers, injunctions, and proceedings in contempt. Even in actions at law there are many matters of fact that must be found by the court below, and which are not even reviewable in this court. Every time a judge below takes the case from the jury and directs a verdict, he practically deprives the party of a trial by jury; and yet that he can so direct a verdict against the party on whom rests the *onus*, when there is nothing more than a scintilla of evidence, has been held in a long line of decisions in this court from Wittkowsky *vs.* Wasson, 71 N. C., 451, down to Spruill *vs.* Ins. Co., 120 N. C., 141, and several cases at this term.

In Interstate Commerce Commission *vs.* Brimson, 154 U. S., 447, 488, the court says: "Another suggestion * * * is that the defendants are not accorded a right of trial by jury. * * * The issue presented is not one of fact, but of law exclusively. In such a case the defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him as an officer to

perform a ministerial duty." Any right of trial by jury
50 which the defendant might have had under other circumstances, if any, would be taken as having been waived by his acceptance of an office under a statute providing for summary suspension. That a jury trial may be waived by either written or oral consent, or even by failure to appear, is expressly provided by section 416 of the Code. It is also held to be waived by a consent reference. Clark's Code, p. 400, and cases cited. In England it is regarded as a prerogative of the Crown by letters patent to suspend a public officer, although the office was granted for life. Throop on Public Officers, section 401; Slingsby's case, 3 Swanst., 178. The only recognition of this rule in America seems to be that involved in the maxim that the power of appointment includes by implication that of removal, the application of which is necessarily limited by constitutional or statutory provision. The maxim cannot apply in this case, because the governor did not originally appoint, and has suspended the defendant under express statutory authority. It comes rather under the generally recognized rule that in the absence of any *constitutional* restriction, expressed or necessarily implied, on the power of the legislature, it may provide by statute for the suspension of a public officer by some other officer or board. Throop, *supra*, sec. 402; Mechen on Public Officers, sec. 463; Butler *vs.* Penn., 10 Howard, 402. With the exception of this State, it is the well-settled doctrine in the United States that an office is not regarded as held under a grant or contract, within the general constitutional provision protecting contracts; but unless the Constitution otherwise expressly provides, the legislature has power to increase or vary the duties or diminish the salary or other compensation appurtenant to the office, or abolish any of its rights of privileges before the end of the term,
or to alter or abridge the term, or to abolish the office
51 itself. Throop, *supra*, sec. 19, citing 92 decisions from the United States Supreme Court and 32 different States; also Black, Const. Law, p. 530, and cases cited. Mechem, *supra*, sec. 463 and 464, citing numerous cases, says that except in North Carolina it is well settled that there is no contract, either express or implied, between a public officer and the government whose agent he is; nor can public office be regarded as the property of the incumbent. In Connor *vs.* N. Y., 2 Sandford, 355, Ruggles, C. J., says: "Public offices are not incorporeal hereditaments, nor have they the character or qualities of grants. They are agencies. With few exceptions, they are voluntarily taken and may at any time be resigned. They are created for the benefit of the public and are not granted for the incumbent. Their terms are fixed with a view to public utility and convenience, and not for the purpose of granting the emoluments during that period to the office-holder.

The celebrated case of Hoke *vs.* Henderson, 4 Dev., 1, recognizes to a great extent the same principle. While deciding in favor of the defendant on the ground that an office is the property of the incumbent by mutual contract, and that the unconstitutional provision was not that of a law *prescribing* a rule of property, or modi-

fying the extent of interest or the tenure *prospectively*, but interfered with *vested* rights, Chief Justice Ruffin (p. 17) says: "That the purpose of creating public offices is the common good is not doubted. Hence most of the rules regulating them have a reference to the discharge of their duties and the promotion of the public convenience; they are *pro commodo populi*. Hence they are *not* the subjects of property in the sense of that full and absolute dominion which is recognized in many other things. *They* are *only the subjects of property as far as they can be so in safety to the general interest involved — the discharge of their duties.*" This court has recently had occasion to reaffirm the doctrine laid down in that oft-quoted
52 decision, which has become too firmly established in the policy of our laws now to be questioned; but the varied and extraordinary claims made thereunder, and the fact that we are the only State in the Union recognizing the doctrine, may well cause us to pause and consider if we have not carried it to its fullest legitimate extent. It may be doubted if the great Chief Justice himself ever contemplated the extent to which it would be carried, and, least of all, that it- most extreme construction would be invoked to bring the tenure of high official positions within the operation of an amendment to the Federal Constitution primarily adopted for the protection of the colored race. See the opinion of Justice Miller in the Slaughter-house cases, 16 Wall., 36.

But our decision in the case at bar does not conflict with that in Hoke *vs.* Henderson. The statute now under consideration is not retrospective, and does not interfere with any vested right. Being a part of the act originally creating the office of railroad commissioner, it "*prescribes*" a rule of property in said office and modifies the extent of interest and tenure therein "*prospectively.*" The defendant, taking under the act, holds subject to the act, and, relying upon his contract, is bound by all its provisions. One of its express provisions was the reserved right of the legislature to remove and the power and duty of the governor to suspend under a given state of facts. This power of suspension, together with the necessary method of its enforcement, was assented to by the defendant in his acceptance of the office. Bunting *vs.* Gales, 77 N. C., 283; McCless *vs.* Meekins, 117 N. C., 34; McDonald *vs.* Morrow, 119 N. C., 665; Ward *vs.* Elizabeth City, 121 N. C.; 27 S. E. Reporter, 993; Koonce *vs.* Russell, 103 N. C., 179; Hutchins *vs.* Town of Durham, 118 N. C., 457; Cooley's Const. Limitations, 285. It was held in Head *vs.* University of Missouri, 19 Wallace, 526, that where one was elected a
53 professor in a State university for six years "subject to law," "this expression meant subject to whatever law the State legislature might see fit to pass. It was a part of the contract that the legislature could, at its discretion and in its pleasure, bring it to an earlier end." In Ewart *vs.* Jones, 116 N. C., 570, which was an action in the nature of a *quo warranto* heard upon a case agreed *without* a jury, this court in seating the relator held that under our present constitution the legislature had the power in establishing the office of judge of the criminal court to prescribe its powers, jurisdiction, and methods of appointment and removal, and to *elect*

the incumbent. Chief Justice Faircloth in delivering the opinion of the court says: "Under our form of government the sovereign power resides with the people and is exercised by their representatives in the General Assembly. The only limitation upon this power is found in the organic law as declared by the delegates of the people in convention assembled from time to time." If the legislature can thus elect a judge of the criminal court and provide for the manner of his removal, why can it not also elect a railroad commissioner, and in the creative act reserve to itself the right to remove and to the governor the power of suspension. Two higher agencies could not be found, one peculiarly representing the will of the people and the other the chief executive of the State, to whom is committed by the constitution itself "the supreme executive power of the State," and who is expressly enjoined "to take care that the laws be faithfully executed;" but it is urged that the legislature has exceeded its constitutional power in reserving the right of removal. We think not, where the office is purely of legislative origin and administrative duties.

54 It is alleged that the statute is unconstitutional because it requires of the railroad commissioners qualifications in addition to those prescribed in the Constitution. We see no merit in this contention, as such provisions were not intended to restrict the rights of the individual, but to secure the faithful and efficient performance of public duties. Hargrove *vs.* Dunn, 73 N. C., 395; Commissioners *vs.* Plaisted, 148 Mass., 375; Rogers *vs.* Buffalo, 123 N. Y., 173, 181; Throop on Public Officers, sec. 73, 74.

Moreover, every presumption is in favor of the constitutionality of an act of the legislature, and all reasonable doubts should be solved in its favor. Cooley on Const. Lim., page 220, and cases therein cited; Black's Const. Law, sec. 30, and cited cases.

While our attention has not been called to any decision from other jurisdictions relating to the removal or suspension of railroad commissioners, we do find in the creative statutes of the United States and of several of the States provisions similar to those now under consideration. The same presumption of constitutionality would attach to them, and thus far they may be considered as precedents. Another constitutional objection to the act has been argued with great force and has received our most careful and serious consideration. That objection is that the act interferes with the independent tenure of the judiciary, so essential to the proper enforcement of the law and the protection of the citizen. This commission was compared to the criminal courts of the State, and the danger of placing the lives and liberties of the people in the keeping of judges whose official tenure might depend upon the uncertain complexion of the legislature or the arbitrary will of the governor was ably and eloquently portrayed.

We realize the responsibilities of this court in settling the line of demarkation between the legislative, executive, and supreme judicial powers, which by constitutional obligation must be kept for-

55 ever separate and distinct. This vital line must be drawn by us alone, and we will endeavor to draw it with a firm

and even hand, free alike from the palsied touch of interest or subserviency and the itching grasp of power. Should the legislative or executive departments of the State cross that line, we will put them back where they belong, but upon us rests the equal obligation of keeping upon our own side. This is a question not of discretion, but of law; a matter not of expediency, but of right.

Our conclusion is that the railroad commission does not stand upon the same footing as the criminal courts, inasmuch as it is an *administrative* and not a *judicial* court. While it was made by a subsequent statute a court of record, it was clearly the object of the act simply to give authenticity to its records and proceedings, as it added nothing to its duties or powers.

It has been held to be a court of record in Express Co. *vs.* Railroad, 111 N. C., 463, 474; but in the opinion of the court, delivered by Chief Justice Shepherd, appears the significant qualification: "Whether a court having no power to enforce its judgment fulfills the definition of a court of record and of general jurisdiction is *unnecessary to be considered.*" The Supreme Court of the United States in Reagan *vs.* Farmers' Loan & Trust Co., 154 U. S., 362, 397, citing the Railroad Commissioner cases, 116 U. S., 307, says: "There can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroads or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an *administrative* board created by the State for carrying into effect the will of the State as expressed by its legislature." Upon the foregoing authorities we are of opinion that the disputed provisions of the act are constitutional, and that the power of suspension rests in the hands of the governor,
56 which, when exercised in an orderly manner, is not reviewable by the courts. Whether the action of the governor was justified by the facts, which he alone could find, is not for us to say. That the defendant has not been deprived of his property without due process of law; that the only property he could have in the office was that given to him by the statute, which must be construed in all its parts. His commission, which is his title deed, appears to us with the fateful words of the creative act written across its face by the hand of the law. Whatever right to a trial by jury he might otherwise have had was waived by his acceptance of the office under the conditions of the statute, at least so far as the action of the governor was concerned. In the court below, as all the material facts that could there be inquired into were practically admitted, there was nothing left but the bare questions of law, and upon those questions we see no error in the ruling of the court. The judgment must therefore be affirmed; but, in view of the public interests involved, we deem it proper not to remand the case, but to enter final judgment in this court. This action is taken on motion of counsel, made without objection, in open court, upon the hearing of the case and under authority of section 957 of the Code, as recognized in Bernhardt *vs.* Brown, 118 N. C., 700, 710. Judgment will therefore be entered, that the relator is entitled to the office of railroad commissioner and chairman of said commission;

that the defendant is not entitled thereto and shall be *be* ousted therefrom, and that the relator be placed into possession of said office, together with all its records and other appurtenances thereunto belonging.

Affirmed.

57 FAIRCLOTH, *C. J.*, dissenting:

As I do not agree with the majority of the court in this case, I feel it my duty to state why I do not. I concede the right of the legislature to abolish any office of its own creation, in which event the officer goes with the office, not upon any notion of implied notice in the acceptance, but because the legislature has the power to abolish. By the act of 1891, chapter 320, the legislature created the office of a railroad commission, with the powers and duties therein enumerated, and elected the members of the commission, the term of office being six years. That said commission is a court of record, with the powers and jurisdiction of a court of general jurisdiction, to the extent of all subjects embraced in said act, is settled. Express Co. *vs.* Railroad, 111 N. C., 463; Railroad *vs.* Tel. Co., 113 N. C., 213; Leavell *vs.* Tel. Co., 116 N. C., 211. That an office is property has been uniformly held since 1833. Hoke *vs.* Henderson, 4 Dev., 1. Section 1 of said act provides: "Said commissioners shall not jointly, or severally, or in any way be the holder of any stock or bonds, or be the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office, and in case any commissioner shall, as distributee or legatee or in any other way, have or become entitled to any stock or bonds or interest therein of any such company, he shall at once dispose of the same; and in case any commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office and to report the fact of his suspension, together with the reason therefor, to the next General Assembly, and the question of his removal from office shall be determined by
58 a majority of the General Assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the General Assembly shall determine that the commissioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified as hereinbefore provided," &c. Thus we see that the governor *suspends* whenever he deems proper, and the legislature *removes* at its will and pleasure, as an *ex parte* proceeding, the officer (commissioner) having no opportunity to be heard. This proceeding is at least a novelty, and so far as I remember is without precedent, certainly so in North Carolina. Such proceedings, no doubt, are found under some forms of government, but they are at variance with all fundamental rules of government in the United States of America. Those rules protect life, liberty, and property in the due administration of law.

My conception is that the act of the governor in suspending the defendant was not an executive function, but simply the act of an agent of the legislature with such power as they attempted to con-

fer on their agent, and that the term "governor" was simply used to identify the agent. I can see no reason why the secretary of state could not as well have been the agent, with directions, for the causes mentioned in the act, to suspend the governor from his office until the legislature should have an opportunity to remove or restore him, as they might choose to do, without any hearing for him. If this can be done for the causes specified in section 1 of the act, then other like causes might be added. Let us then suppose that the legislature, in addition, had said: If the governor shall own any stock in any railroad in this State or shall receive any benefit, convenience, or accom-odation from any railroad, then the sec-
59 retary of state shall suspend him from office and report his act *ot* the next legislature, and that they will remove or restore him, as seems good to them. It seems to me that such action would be in derogation of his rights under article III, sec. 12, and article IV, sec. 3 and 4, of the constitution, providing for his conviction, removal, and disqualification for office. It is true that he is a constitutional officer, and so is the defendant, under the authority of article IV, section 2.

So the real question is the *power* of the legislature to suspend and remove a judicial officer from his office, and thus forfeit his property without giving him a trial.

Under our form of government the source of all power is the people. At the outset they declared their will in the constitution and adopted by common consent general rules for governing themselves known as the law of the land, and each department, with their many subdivisions, are subordinate to those fundamental principles. The constitution is a brief and condensed expression of law, and must be taken as expressed, with all of its reasonable implications. Among its utterances we find: "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other." Art. I, sec. 8.

"The executive department shall consist of a governor, in whom shall be vested the supreme executive power of the State," &c. Art. III, sec. 1.

"The judicial power of the State shall be vested in a court for the trial of impeachments, a supreme court, superior courts, courts of justices of the peace and such other courts inferior to the supreme court, as may be established by law." Art. IV, sec. 2.

"The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightly
60 pertains to it as a co-ordinate department of the government." Art. IV, sec. 12. And this article provides, further, that the legislature may distribute the power and jurisdiction, provide for appeals, and regulate the method of proceeding as it may deem best, "so far as the same may be done without conflict with other provisions of this constitution." "No person ought to be taken, imprisoned or disseised of his freehold, liberties or privileges, or outlawed or exiled or in any manner deprived of his life, liberty or *property*, but by the law of the land." Art. I, sec. 17.

"In all controversies at law respecting property, the ancient mode

of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." Art. I, sec. 19.

The terms "due process of law" and "the law of the land," when the rights of property are under consideration, are not easily distinguished. I have seen no better definition of the latter than that given by Mr. Webster in Dartmouth College *vs.* Woodward, 4 Wheat., 519 (Works of Webster, vol. V, p. 487). "By the law of the land is most clearly intended the general law—a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms, would be
the law of the land. Such a strange construction would
61 render constitutional provisions of the highest importance
completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country."

A glance at the above recitals would seem to answer without further argument the question, "Has the legislature the power, directly or indirectly, to suspend or remove a judicial officer and declare his right and property in his office forfeited?"

It has been universally held in this country wherever *freemen* live that no forfeiture of an office nor vacancy therein can be judicially declared until the accused has had a trial and sufficient cause is established. Hoke *vs.* Henderson, 4 Dev., 1; People *vs.* Heaton, 77 N. C., 18; Vann *vs.* Pipkin, 77 N. C., 408; State *vs.* Norman, 82 N. C., 687.

"The term 'law of the land' does not mean merely an act of the General Assembly. If it did, every restriction upon the legislative authority would be at once abrogated." Hoke *vs.* Henderson, *supra.*

Suppose the General Assembly at its next meeting shall examine the governor's report and, finding no sufficient cause, shall *adjudge* that defendant was not duly suspended, and that he has not forfeited his office, and the plaintiff shall refuse to surrender his possession of the office, what then? With these conflicting decisions, to what tribunal can the parties appeal for a finality? Any legislative act that *can* lead to such a result must be a nullity. Any legislative sentence declaring a forfeiture of property is judicial in its nature, and when rendered without a hearing and trial is in the nature of things void. The constitutionality of an act is determined by its effect rather than the intent of the legislature. Bank Tax case, 2 Wallace,

200; Provident Ins. Co. *vs.* Mass., 6 Wallace, 611. It may be
62 competent, as I have said, to abolish an office when the property therein is necessarily lost, but it is quite a different proposition to continue the office, discharge the officer at pleasure, and give his office to another. I am told that every office is accepted with notice that the officer may be displaced or removed. That is not an express condition, but at most is only an implied condition, and it is equally implied that such removal, when personal and property rights have vested, can be made only after *cause* established by a court having jurisdiction and by proceedings recognized by the general and fundamental rules of law and by judicial authority. Conditions precedent may bar an entry, but a condition subsequent, even if it be illegal or immoral, cannot divest an estate. A subsequent condition is not self-executing, and when invoked for the purpose of convicting and declaring a forfeiture it becomes effective only under the rule and the manner above stated.

There is no allegation of incompetency, bad faith, or misadministration against the defendant in the discharge of his duties in office. The matters preferred by the governor in his suspending order, rather vaguely stated and based upon private information and newspaper reports, are inserted in the complaint and substantially constitute the complaint. The defendant specifically denies each material allegation. When brought before the superior court under the form of a trial the defendant demanded to hear the proof of the matters alleged, to confront his accusers, to cross-examine, to introduce his own evidence, and to have the issues determined by a jury of his peers. These requests were all refused by the court and judgment was pronounced declaring that defendant had been duly suspended from his office and ordering his ouster therefrom. This court is now appealed to to affirm said judgment and approve the procedure below in this case.

63 Without exhausting the argument, my excuse for tediousness is the importance of this question. I think the plaintiff's contention is injurious, subversive, and contrary to the organic law of our system of government, and that it is unreasonable and unjust, and that the decisions of any court in any State disregarding those principles must soon fall under the condemnation of the legal mind in this country.

64 *Judgment.*

This cause coming on to be heard in the supreme court and having been decided in favor or the plaintiff, it is adjudged and decreed:

1. That the defendant has been lawfully suspended from the office of railroad commissioner.

2. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant.

3. That the defendant be ousted from and the relator be inducted into said office of railroad commissioner.

Therefore let a writ issue out of this court, directed to the sheriff or other lawful officer of Wake county, commanding him to oust the defendant and put the relator in possession of the rooms occupied as offices by the railroad commissioners, in the Agricultural building, on Edenton street, in Raleigh, and known as the railroad commission offices, together with all property, paper, and effects appertaining or belonging to said offices.

That the plaintiff relator recover the costs of this action, to be taxed by the clerk of this court.

WALTER CLARK,
Justice Supreme Court.

65 *Entry of Record.*

At 5.30 p. m. on December 23 the plaintiff, through his counsel, William H. Day, obtained a writ of execution, directed to the sheriff of Wake county, in the following words:

(Title of Cause.)

Supreme Court of N. C., Fall Term, 1897.

The State of North Carolina to the sheriff of Wake county, Greeting:

Whereas in the above-entitled cause it was adjudged at this term that the defendant wrongfully withholds possession of the office of railroad commissioner from the plaintiff relator, and that plaintiff relator is entitled to the possession of the same, these are therefore to command you forthwith to put the relator in possession of the rooms occupied as offices by the railroad commissioners, in the Agricultural building, on Edenton street, and known as the railroad commission offices, together with all property, papers, and effects appertaining or belonging to said offices, and to oust the defendant from said office and to induct the plaintiff's relator into the same, and you shall make due return thereof on the first day of the next term of this court.

Witness this 23rd day of December, 1897.

By the court:

[L. S.] THOS. S. KENAN, *S. C. C.*

66 North Carolina Supreme Court, December 24, 1897.

The plaintiff, through his counsel, William H. Day, mowed (orally) in open court to set aside the supersedeas proceedings or adjudge them irregular, and the counsel for the defendant submitted the following motion:

To the honorable the supreme court of North Carolina:

The defendant respectfully shows to the court that judgment herein was rendered in the afternoon of Thursday, December 23, 1897; that execution thereon was issued by the clerk of this court to the sheriff of Wake county about 5.30 o'clock p. m. on the same

day, but has not been executed; that the defendant's counsel sued out a writ of error to the Supreme Court of the United States, which was duly issued by the clerk of the United States circuit court for the eastern district of North Carolina and was allowed by the chief justice of this court on the same day; that the defendant also gave a good and sufficient bond in a penal sum fixed by his honor the chief justice, conditioned as a supersedeas bond, who duly approved said bond and signed the citation; that at 7.10 o'clock p. m. the defendant's counsel filed said writ of error and bond in the clerk's office of this court, and at the same time lodged therein a copy of said writ of error for the State of North Carolina and a copy for L. C. Caldwell. The defendant submits to the court that the judgment of the court is superseded, and he respectfully asks that the said execution be recalled.

R. O. BURTON,
SPIER WHITAKER,
For Defendant.

This 24th December, 1897.

On the same day, December 24, the following opinion was handed down:

67 CLARK, *J.:*

This is a motion by defendant to recall the execution which issued to put the relator in possession of the furniture, rooms, and other tangible property belonging to the railroad commission. The relator moved to set aside the supersedeas proceedings or adjudge them irregular. We are of opinion that we have no power to set aside the writ of error or pass upon the regularity thereof. We are also of opinion that the judgment of this court, *ex proprio vigore*, placed the relator in possession of the office at the time the judgment was filed. He having already qualified, no process was necessary for that purpose. He is in full possession of the same and entitled to exercise its duties and draw the salary thereto attached from the date of his appointment. The judgment took effect immediately upon being filed and is not superseded by the subsequent writ of error, regular or irregular. Foster *vs.* Kansas, 112 U. S., 201. The relator being in office by virtue of the judgment of this court, any attempt by the defendant to exercise its functions or to interfere with the full and free exercise thereof by the relator and any attempt by any one else to interfere, by alleged legal process or otherwise, unless and until the Supreme Court of the United States shall reverse the judgment of this court, will be a contempt of this court. We decline to make any order recalling the execution.

Both motions refused.

68 North Carolina Supreme Court.

I, Thomas S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true, and correct transcript of the action entitled State of North Carolina on

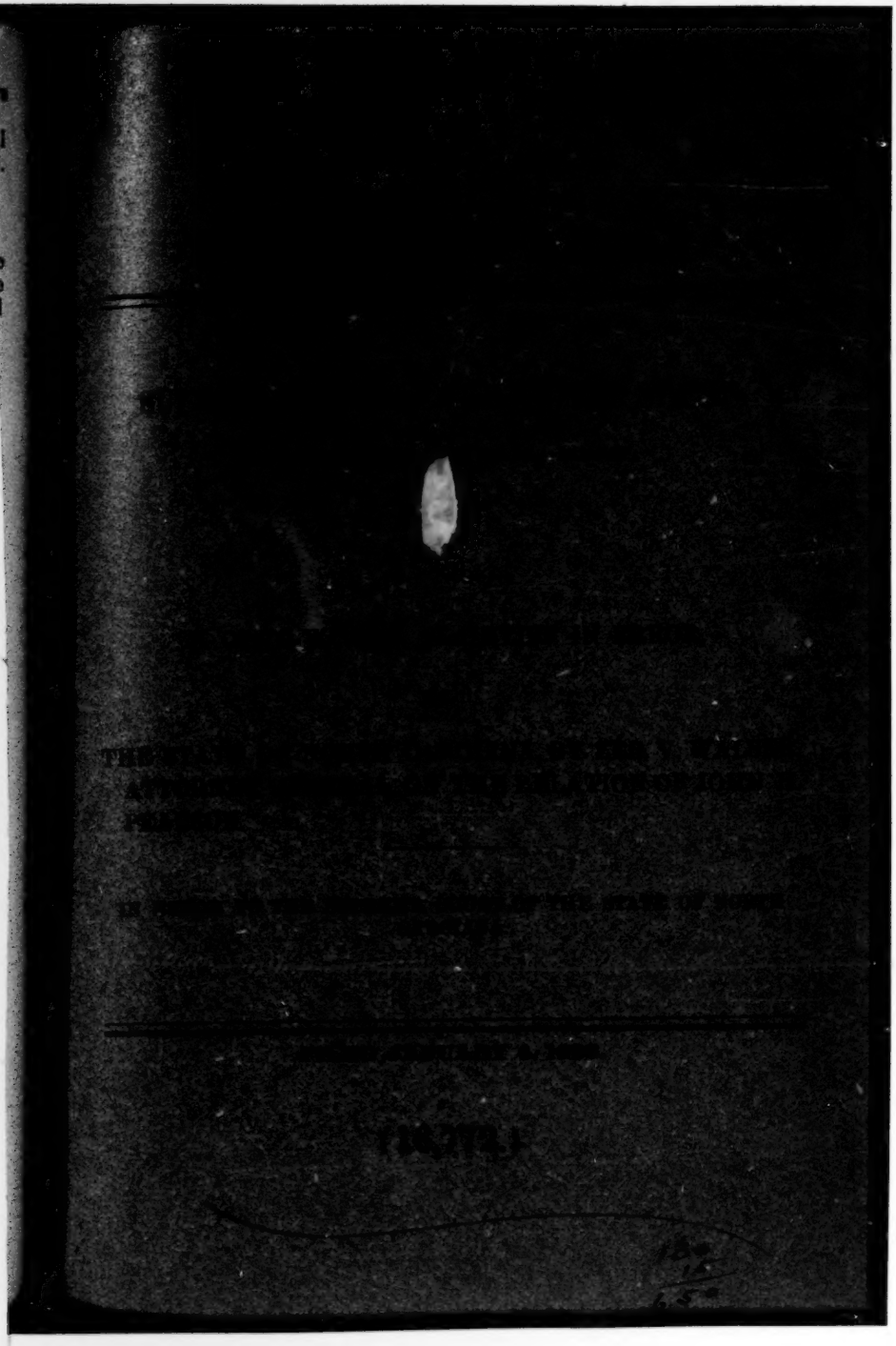
the relation of L. C. Caldwell against James W. Wilson, as appears of record in this court.

In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this 29th day of December, 1897.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

Endorsed on cover: Case No. 16,771. North Carolina supreme court. Term No., 558. James W. Wilson, plaintiff in error, *vs.* The State of North Carolina on the relation of L. C. Caldwell. Filed January 4th, 1898.



(16,772.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 559.

S. OTHO WILSON, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA, BY ZEB. V. WALSER, ATTORNEY GENERAL, ON THE RELATION OF JOHN H. PEARSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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PEARSON
v.
WILSON. } Case No. 160 "A."

From the supreme court of the State of North Carolina.

NORTH CAROLINA:

In Supreme Court, September Term, 1897.

TE OF NORTH CAROLINA, by ZEB. V. Valser, Attorney General, on Relation f John H. Pearson,
against
S. OTHO WILSON. } Petition for Writ of Error.

The above-named defendant, considering himself aggri-ved by the gment and decision of the supreme court of North Carolina dered December 23, 1897, excepts to said judgment and decision l prays for a writ of error to the end that said judgment and de-on may be inquired into by the Supreme Court of the United tes and all errors found therein be reversed. Wherefore he prays t said writ of error be granted and a transcript of the record l proceedings and papers upon which said judgment and de-on was rendered, duly authenticated, may be sent to the Supreme irt of the United States.

Raleigh, N. C., December 23d, 1897.

R. O. BURTON,
Attorney for S. Otho Wilson.

UNITED STATES OF AMERICA, *ss:*

e President of the United States of America to the honorable the udges of the supreme court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of e judgment of a plea which is in the said supreme court, before you some of you, being the highest court of law or equity of the said ate in which a decision could be had in the suit wherein The ate of North Carolina, by the attorney general, on the relation of hn H. Pearson, is plaintiff and S. Otho Wilson is defendant, herein was drawn in question the validity of a statute of or of an thority exercised under said State, on the ground of their being pugnant to the Constitution, treaties, or laws of the United States, d the decision was in favor of such their validity, a manifest error ath happened, to the great damage of the said S. Otho Wilson, as by s complaint appears, we, being willing that error, if any hath been, ould be duly corrected and full and speedy justice done to the arties aforesaid in this behalf, do command you, if judgment e therein given, that then, under your seal, distinctly and openly, ou send the records and proceedings aforesaid, with all things con-erning the same, to the Supreme Court of the United States,

together with this writ, so that you have the same at Washington on the 20th day of January, 1898, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

4 Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23d day of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-second.

[Seal U. S. Circuit Court, Eastern District of N. C.]

N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

Allowed by—
W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

5 North Carolina Supreme Court, September Term, 1897.

STATE OF NORTH CAROLINA, by ZEB. V. WALSER, Attorney General, on Relation of JOHN H. PEARSON,
against
S. OTHO WILSON.

Assignment of Errors.

And now, on this 23d day of December, 1897, comes the defendant, S. Otho Wilson, plaintiff in error, by his attorney, Robert O. Burton, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

First. That the supreme court erred in holding that the defendant was not removed or suspended from his office of railroad commissioner without due process of law and contrary to the fourteenth amendment to the Constitution of the United States.

Second. That the supreme court erred in holding that in the removal or suspension of the defendant he was not deprived of the equal protection of the laws, contrary to the fourteenth amendment to the Constitution of the United States.

Third. That it appears by the record in this case that the governor made certain charges against the defendant in his letter of August 24th, 1897, and cited him to appear before him on the first day of September, 1897, and show cause in writing and to make answer and proofs in writing and to be there in person or by counsel, at his election; that the defendant appeared and filed a written denial of all the charges and demanded to be confronted with his accusers and to hear and cross-examine the witnesses against him; that said demand was refused; that the facts were not in the personal knowledge of the governor, and that the governor, without evi-

dence and without a trial, undertook to find generally
6 that the defendant had violated the railroad commission law in some of the particulars mentioned in his letter of August 24th, 1897, set out in the complaint, and that the defendant had not only violated the said act in the specifications set out in the said act, but that he had otherwise within the intent and meaning and words of said act become disqualified to act, and thereupon the governor undertook to suspend or remove the defendant and deprive him of his office and appointed the relator, John H. Pearson, to fill the same; that defendant declined to surrender his office, and thereupon this action in the nature of *quo warranto* was brought to oust him therefrom; that in the superior court the defendant filed his answer, controverting all the charges made against him, and tendered issues covering all phases of the controversy; that the trial court refused to submit the issues or any issues to the jury, but ruled that the statute and the action of the governor did not deprive the defendant of his liberties and property without due process of law, and that the plaintiff was entitled to judgment for the possession of the office on the pleadings; that the defendant duly excepted and appealed to the supreme court, and the ruling and decision of the trial court was sustained and the judgment affirmed.

The defendant says said ruling and decision is erroneous and in violation of the fourteenth amendment to the Constitution of the United States.

Fourth. That the defendant is a judge of a court of record under the laws of North Carolina, and no judge or other officer is liable to removal or suspension by the governor. Moreover, the constitution of North Carolina, art. 4, sec. 30, confers the power of removal of judges on the General Assembly for mental and physical
7 inability, which this defendant claims is a prohibition against removal by the governor or legislature for other causes. The supreme court holds that by the action of the governor the defendant is not deprived of the equal protection of the laws, and the defendant says that the said ruling and decision are erroneous and in violation of the fourteenth amendment to the Constitution of the United States.

Wherefore the said S. Otho Wilson prays that the judgment of the supreme court of North Carolina be reversed.

Raleigh, N. C., December 23d, 1897.

R. O. BURTON,
Defendant's Attorney.

8 UNITED STATES OF AMERICA, *ss:*

To the State of North Carolina and Zeb. V. Walser, attorney general, and John H. Pearson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the 20th day of January, 1898, pursuant to a writ of error filed in the clerk's office of the supreme court of North Carolina, wherein S. Otho Wilson is plaintiff in error and The State of North Carolina, by Zeb.

V. Walser, attorney general, on the relation of John H. Pearson, is defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness William T. Faircloth, chief justice of the supreme court of North Carolina, this 23d day of December, 1897.

W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

The foregoing papers endorsed: Filed on Thursday, the 23d day of December, 1897, at 7.10 p. m., in the supreme court of North Carolina clerk's office, together with copies of the writ of error for the State of North Carolina and for Z. V. Walser, attorney general, and for John H. Pearson, plaintiff, relator.

9 In the Supreme Court of the United States.

S. OTHO WILSON, Plaintiff in Error,
against
THE STATE OF NORTH CAROLINA, by Z. V. WALSER, Attorney General, on Relation of JOHN H. PEARSON, Defendant in Error.

I, O. J. Carroll, United States marshal for the eastern district of North Carolina, do hereby certify that on the 24th day of December, 1897, in my district aforesaid, I served the citation herein on John H. Pearson by delivering to him a true copy thereof, and on the 29th day of December, 1897, in my district aforesaid, I served the said citation on the State of North Carolina by delivering a true copy thereof to Daniel L. Russell, governor of said State.

Witness O. J. Carroll, United States marshal for said district, this December 29th, 1897, in Raleigh, N. C.

O. J. CARROLL,
U. S. Marshal,
By J. E. CARROLL, *D. M.*

Fees, $4.00, p'd by plaintiff in error.

10 [Endorsed:] S. O. Wilson *v.* The State of N. C. Marshal's certificate.

11 UNITED STATES OF AMERICA:

In Supreme Court.

S. OTHO WILSON, Plaintiff in Error,
against
THE STATE OF NORTH CAROLINA, by Z. V. WALSER, Attorney General, on the Relation of John H. Pearson, Defendant in Error.

I do hereby admit service of the citation in this cause on this 27th day of December, 1897.

ZEB. V. WALSER,
Attorney General of North Carolina.

12 [Endorsed:] S. Otho Wilson, plaintiff in error, *v.* State *ex rel.* Jno. H. Pearson. Admission of service.

13 *Bond on Writ of Error.*

Know all men by these presents that we, S. Otho Wilson, as principal, and J. S. Carr and H. C. Brown, as sureties, are held and firmly bound unto the State of North Carolina and John H. Pearson in the sum of four thousand dollars, to be paid to the said State of North Carolina and John H. Pearson or either of them, their attorneys or assigns; for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of December, 1897.

Whereas at the September term, 1897, of the supreme court of North Carolina, in an action therein depending between The State of North Carolina, by Zeb. V. Walser, attorney general, on relation of John H. Pearson, plaintiff, and S. Otho Wilson, defendant, a judgment has been rendered in favor of the plaintiff, ousting the defendant from his office of railroad commissioner and taxing him with costs; and whereas the defendant has obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid action, and a citation directed to the said plaintiffs has been issued, citing and admonishing them to be and appear at the United States Supreme Court, in Washington, on a day named in the citation mentioned: Now, the condition of the above obligation is such that if the said S. Otho Wilson shall prosecute his said writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

S. OTHO WILSON. [SEAL.]
J. S. CARR. [SEAL.]
H. C. BROWN. [SEAL.]

14 J. S. Carr, being duly sworn, says that he is worth the sum of ten thousand dollars over and above his exemptions by law and his indebtedness.

J. S. CARR.

Sworn to and subscribed before me this December 14, 1897.

W. T. SMITH, [L. S.]
Notary Public.

H. C. Brown, being duly sworn, says that he is worth the sum of two thousand dollars over and above his exemptions by law and his indebtedness.

H. C. BROWN.

Sworn to and subscribed to before me this Dec. 15, 1897.

W. T. SMITH, [L. S.]
Notary Public.

Approved December 23, 1897.

W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

Endorsed: Filed December 23, 1897, at 7.10 p. m., in the supreme court of N. C. clerk's office.

15 *Transcript to Supreme Court of North Carolina.*

NORTH CAROLINA,
Wake County.

Be it remembered that on the 4th day of October, A. D. 1897, the State of North Carolina, by Zeb. V. Walser, attorney general, on the relation of John H. Pearson, railroad commissioner, sued and prosecuted out of the superior court of the county aforesaid a summons in the words hereinafter following:

NORTH CAROLINA, EXECUTIVE DEPARTMENT,
OFFICE OF THE ATTORNEY GENERAL,
RALEIGH, N. C., *Sept. 30th*, 1897.

STATE on Relation of JNO. H. PEARSON
v.
S. OTHO WILSON.

Application having been made to me by John H. Pearson for leave to bring an action in the name of the State upon the relation of the said John H. Pearson *v.* S. Otho Wilson, in the superior court of Wake county, to try the title to the office of railroad commissioner of North Carolina, and satisfactory security having been tendered me under section 608 of the Code to indemnify the State against all costs and expenses which may accrue in consequence of the bringing of such action—

Leave is hereby granted to the said applicant to bring the said action in the name of the State upon the relation of the said applicant against the said S. Otho Wilson.

ZEB. V. WALSER,
Attorney General.

WAKE COUNTY:

In the Superior Court.

THE STATE OF NORTH CAROLINA, by ZEB. V. Walser, Attorney General, on the Relation of John H. Pearson, Railroad Commissioner,
v.
S. OTHO WILSON.
Summons for Relief.

The State of North Carolina to the sheriff of Wake county, Greeting:

You are hereby commanded to summon S. Otho Wilson, the defendant above named, if he be found within your county, to be and

to appear before the judge of our superior court, at a court to be held for the county of Wake, at the court-house in Raleigh, N. C., on the seventh Monday after the first Monday of September, 1897, it being the 25th day of October, 1897, and answer the complaint, a copy of which is served with the summons, and let the said defendant take notice that if he fail to answer the said complaint within the time required by law the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 4th day of October, 1897.

D. H. YOUNG,
Clerk Superior Court, Wake County.

We acknowledge ourselves bound unto S. Otho Wilson, the defendant in this action, in the sum of two hundred dollars, to be void, however, if the plaintiff's relator, John H. Pearson, shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals, this 27th day of September, 1897.

JNO. H. PEARSON. [SEAL.]
W. C. EWIN. [SEAL.]
C. MANLY McDOWELL. [SEAL.]

Sworn to and subscribed before me this 27th day of September, 1897.

P. W. PATTON, *C. S. C.*

16 STATE *ex Rel.* JOHN H. PEARSON
v.
S. OTHO WILSON.

Summons for Relief.

Returnable to —— term, 189–, of the superior court of Wake county.

Received October 4th, 1897.

Served October 4th, 1897, by reading this summons and delivering a copy of the same and of the complaint hereto attached to the defendant.

Fee sheriff $1.20, paid to use C. S. C.

HAM T. JONES,
Sheriff of Wake County.
W. T. OAKS, *D. S.*

MACRAE & DAY,
Plaintiff's Attorneys.

NORTH CAROLINA,
Wake County.

Superior Court, October Term, 1897.

THE STATE OF NORTH CAROLINA, by ZEBULON V. Walser, Attorney General, on the Relation of John H. Pearson, Railroad Commissioner,
v.
S. OTHO WILSON. } Complaint.

The plaintiff complains and alleges:

1. That the plaintiff's relator is a citizen and tax-payer of the county of Burke, in the State of North Carolina.

2. That the defendant, on and before the 23d day of September, 1897, was a railroad commissioner, elected by the General Assembly of North Carolina, at its session of 1896, for the term of six years from the ——, 1896.

3. That as the relator is informed and believes, on the 24th day of August, 1897, His Excellency, Daniel L. Russell, governor of North Carolina, addressed and sent to the defendant a communication in the following words:

Notice to Hon. Otho S. Wilson.

STATE OF NORTH CAROLINA,
EXECUTIVE DEPARTMENT,
RALEIGH, *August* 24, 1897.

To S. Otho Wilson, Esq., member of the railroad commission of North Carolina.

SIR: By section first of the railroad commission act, ratified the fifth day of March, 1891, it is made the duty of the governor to suspend from the office any railroad commissioner who shall be holder of "any stock or bond of any railroad company; or be the agent or employee of any such company; or have any interest in any way in such company; or in case any one of them shall become disqualified to act." It is alleged that a certain hotel property, known as Round Knob, is jointly owned by Maj. J. W. Wilson and Col. A. B. Andrews; said Wilson being one of the railroad commissioners and said Andrews being the first vice-president of the Southern Railroad Company and its active and general political manager for this State; that this property is of little or no value, except for the hotel, and worthless as a hotel except as a railroad eating-house when so designated and patronized by the Southern Railroad Company; that this hotel has been closed for several years and has been producing no income for its owners; that you, either in your own name or in that of your mother, entered into an agreement with Messrs. Wilson and Andrews for a lease of this property for the purpose of establishing a railroad eating-house, and upon obtaining such agreement, you moved into the hotel in the month of May or June of this year and have been continuously since operating the

property for your own pecuniary profit under said agreement; that previous to your rental or lease of this property the railroad company maintained an eating-house at Hickory and another at Asheville, for the accommodation of their various passenger trains
17 going both west and east; that promptly upon your opening your hotel at Round Knob these eating-houses were discontinued, and both the western and eastern trains have been and still are stopped at your hotel for meals in pursuance of an understanding or agreement or contract between you of the one part and Messrs. Andrews and Wilson and the Southern Railroad Company of the other part.

These allegations have been made to me by many persons, and I think publication of them has been made in the public press. If they or the material substance of them be true—as to which I am expressing no opinion—then the questions to be determined are as follows:

First. Have you not become an agent or an employee of said railroad company in violation of law?

Second. Have you acquired any interest in any way in such company in violation of law?

Third. Have you become disqualified to act as a fair and impartial judge or commissioner?

Under the law the governor not only has a right, but is required to suspend a railroad commissioner who commits a breach of the statute which has been cited, and this he may do, as in other cases of executive removals, without notice to the party interested; but I shall not pass judgment or decide this matter until you have a full opportunity to be heard by way of denial or explanation or justification or other defence. You will, therefore, please show cause in writing on or before Wednesday, the first day of September, 1897, at the executive office in Raleigh, why you should not be suspended from your said office and a report thereof made to the next General Assembly according to law. On the return day of this notice you will please make answer and proofs in writing and be there in person, or by counsel, at your election.

DANIEL L. RUSSELL,
Governor of North Carolina.

And on the 1st day of September, 1897, the defendant sent to the governor aforesaid the following reply to the said communication:

RALEIGH, N. C., *September* 1, 1897.

Hon. Daniel L. Russell, governor of North Carolina.

SIR: Replying to your notice of the 24th of August to show cause why I should not be suspended from the exercise of the duties of my office as railroad commissioner, I have this to say:

I have no interest in any way in the Southern Railway Company, or any other company or corporation over which the railroad commission has jurisdiction.

I am not in any way interested in the eating-house at Round

Knob. I rented the house for my mother—the rent she pays being repairs to the house for the first year, with an option to rent for five years at $250 per year. I have paid my board for myself and family, and have not and am not to receive one cent from the profits of the house. When at home I have rendered my mother such service as I could in managing the house, and the same services have been performed by other members of the family.

The arrangements to have the trains stopped at Round Knob for dinner was made by the railroad authorities upon their own motion, and is determinable by the Southern Railway Company at any time.

I have been owing my mother several hundred dollars borrowed money for several years, and I have purchased furniture and supplies for the Round Knob house and charged same to her in part payment of my debt.

I have no knowledge of the discontinuance of dinner-houses at Asheville and Hickory. They were not closed in consequence of an agreement with my mother to make Round Knob a dinner-house.

18 That a month before the notice of the governor was received this affiant had seen Messrs. Wynne & Ellington, of this city, relative to renting a house for the purpose of bringing his family back to Raleigh. That since that time and before the notice of the governor was received, the contract of renting was completed, and the affiant and family are now living therein.

That affiant and family went to Round Knob for the summer because his wife had been in bad health and the family physician advised this change for the benefit of Mrs. Wilson.

Wherefore I say:

First. That I have not become agent or an employee of the Southern Railway Company.

Second. That I have not acquired any interest in any way in the Southern Railway Company.

Third. Not having any interest in any way in the Southern Railway Company, or any other company or corporation over which the railroad commission has jurisdiction, I have not become disqualified to act as a fair and impartial judge or commissioner.

In support hereof I submit the statements of my mother, Mrs. Mary J. Wilson, Col. A. B. Andrews, Maj. J. W. Wilson, Messrs. Wynne & Ellington, and Dr. A. W. Goodwin.

And in addition to this sworn statement of facts, I respectfully refer to my record as commissioner as proof conclusive that I am not, and have not been, influenced by any railroad company, or any other company or corporation, over which the railroad commission has jurisdiction.

I suppose that in due course of law, after reading the absolute and unqualified denials of this answer, supported and corroborated by the affidavits herewith filed, that the unsupported charges against me of a partisan press and malicious meddlers, will be immediately dismissed as without foundation and wilful and maliciously false.

If I am mistaken in the view of your decision, then I demand to confront my accusers and cross-examine the witnesses against me.

Very respectfully, S. OTHO WILSON.

STATE OF NORTH CAROLINA, }
McDowell County. }

To whom it may concern:

I see it stated that S. Otho Wilson, my son, a railroad commissioner for North Carolina, is charged with being an agent and employee of the Southern Railway Company, in that he is the lessee of the Round Knob hotel on said Southern railway.

I am a widow and have only one son. I have, while able, earned my own livelihood, and have been engaged in keeping hotels for the past thirty years, though not continuously.

I am the sole lessee of the Round Knob Hotel property, the same being rented from Maj. Jas. W. Wilson, of Burke county.

My son, S. Otho Wilson, and his family have been guests of my hotel from May 1 to August 23, 1897, and have paid their board. My son has, while here, aided me in every way he could, by managing any affairs for us that he could. He has bought supplies, furniture, etc., and has paid for same out of receipts, in part, but largely with money he paid of his own, the same being a credit on notes held by me against him, which he owed me for money loaned him.

I hope he will never be so undutiful a son as not to look after the interests of a widowed mother.

(Signed) M. J. WILSON.

19 AUGUST 31, 1897.

A. W. Goodwin, M. D., being duly sworn, deposeth and says:

First. That his occupation is that of a practicing physician and a member of the Raleigh Academy of Medicine, residing in the city of Raleigh, N. C.

Second. That he is a regular physician in attendance upon the family of S. Otho Wilson.

Third. That the health of the wife of S. Otho Wilson has been feeble for the past twelve months.

Fourth. Owing to the condition of her health, I advised her removal to the mountains of North Carolina for the summer, which advice was followed.

Fifth. That I have been attending Mrs. Wilson recently, and that upon my advice (she intending to move to Raleigh about September 1) Mr. Wilson removed his family back there the past week.

(Signed) A. W. GOODWIN, M. D.
D. H. YOUNG, *C. S. C.*

September 1, 1897.

RALEIGH, N. C., *August* 31, 1897.

To whom it may concern:

On July 26, 1897, S. Otho Wilson applied to us for the rent of a house in West Raleigh, N. C., and we did not at the time have one,

but he understood that we would have one soon near the college, and after several calls on us we rented him the house in West Raleigh, near the A. & M. college, which he now occupies.

Yours truly,

(Signed) WYNNE, ELLINGTON & CO.,
Insurance and Real-estate Agents.

A. B. Andrews, being duly sworn, says:

That he is a citizen of Raleigh, N. C., and first vice-president of the Southern Railway Company; that he owns one-fourth interest in the Round Knob Hotel property and the ten acres on which it is located, and that Maj. J. W. Wilson did own the other three-fourths; that the lease for the same — to Mrs. M. J. Wilson, and affiant had no connection whatever with it, and did not know of it until after the contract was completed; that the arrangement for the passenger trains to stop at Round Knob was made because there was dissatisfaction with the dinner-house at Asheville, and the company was considering the propriety of building an eating-house somewhere on the line between Asheville and Old Fort. An additional reason for re-establishing the dinner-house at Round Knob (where it has been for most of the time for twelve years or more) was that, according to the schedule, it was more convenient for the passengers on both trains. The train from Salisbury arrived at Round Knob at 12.50 and the train from Asheville at 12.55 p. m.; that so far as this affiant knows, Mr. S. Otho Wilson has no connection with the hotel, and had nothing whatever to do with the lease of the hotel to his mother (who, as affiant knows, has long been engaged in keeping a boarding-house and hotel) or with the arrangement by which the trains stop there for dinner; that Mr. S. Otho Wilson has no interest, legal, financial or otherwise, in the Southern railway, or that he had any before or since he was elected one of the railroad commissioners, so far as the affiant has any knowledge or information. The same is true of Major Wilson.

(Signed) A. B. ANDREWS.

Sworn and subscribed to before me this 30th day of August, 1897.

(Signed) D. H. YOUNG, *C. S. C.*

20 And on the 23d day of September, 1897, the said governor of North Carolina issued and sent to the defendant the following communication and order:

EXECUTIVE DEPARTMENT, RALEIGH, N. C., *Sept.* 23, 1897.

To S. Otho Wilson, railroad commissioner.

SIR: Take notice that, after due investigation and consideration, I am convinced that you have violated the railroad commission law in some of the particulars mentioned in my letter to you August 24th, 1897, and that you have not only violated said act in the specifications set out in said act, but that you have otherwise, within the meaning and intent and words of said act, "become disqualified to act."

Now, therefore, in obedience to the duty imposed upon me by

said act of assembly, I do hereby suspend you from the office of railroad commissioner—such suspension to continue until the question of your removal or restoration shall be determined "by a majority of the General Assembly, in joint session."

The fact of your suspension, together with the reasons therefor, and the evidence, documents and information connected therewith, will be reported to the next General Assembly.

You will further take notice that under and by virtue of the powers conferred and the duties imposed by the law upon the chief executive, I have appointed John H. Pearson, Esq., of the county of Burke, to fill the vacancy created by your suspension.

Inasmuch as you are understood to deny the power of the executive to suspend you from office, as provided by the statute, I have requested Mr. Pearson to make demand on you for the possession of the office, and upon your refusal, to bring action therefor, to the end that the title to the office may be judicially determined.

D. L. RUSSELL, *Governor.*

To which he received the following reply:

NORTH CAROLINA RAILROAD COMMISSION,
RALEIGH, *Sept.* 24, 1897.

To Dan'l L. Russell, governor.

SIR: Yours of the 23d received and noted.

S. OTHO WILSON,
Railroad Commissioner.

4. And, therefore, the relator avers and so charges, on information and belief, that on the 23d day of September, 1897, his excellency, Daniel L. Russell, governor of North Carolina, in pursuance of the power and authority vested in him by sec. 1, of chap. 320, of the Laws of the State of North Carolina, passed by the General Assembly at its session of 1891, ratified the 5th day of March, 1891, and in execution of the duty devolved upon him by the said act, suspended the said S. Otho Wilson from the said office of railroad commissioner. And on said 23d day of September, 1897, the said governor of North Carolina appointed the plaintiff's relator, John H. Pearson, a railroad commissioner, to fill the vacancy caused by the suspension of the said S. Otho Wilson from said office, from the said 23d day of September, 1897, to continue until the next General Assembly shall determine the question of the removal of said S. Otho Wilson, or until his successor shall be elected and qualified according to law.

5. That the plaintiff's relator has duly qualified as railroad commissioner as aforesaid, by taking the oaths prescribed by law.

6. That the plaintiff's relator, since his appointment and qualification as aforesaid, and before the commencement of this action, demanded of the said S. Otho Wilson that he, the said S. Otho Wilson, should vacate the said office of railroad commissioner, and surrender the same to the relator, and the said S. Otho Wilson refused to vacate and surrender the said office to the relator.

21 7. That the defendant, notwithstanding his suspension from the office of railroad commissioner by the governor of North Carolina, as hereinbefore stated, refuses to vacate the same, and does now unlawfully usurp, intrude into, hold and exercise the said office of railroad commissioner, and does prevent and hinder the relator from performing the duties of said office.

8. That the said office of railroad commissioner is an office of trust and profit under the laws of North Carolina.

9. That this action is brought by leave of the attorney general of said State.

Wherefore plaintiff demands judgment:

1. That the defendant has been suspended from his office of railroad commissioner according to law.

2. That the defendant be adjudged guilty of unlawfully holding and exercising said office, and that he be fined $2,000, pursuant to the statute.

3. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant, and is entitled to hold and exercise the said office.

4. That the defendant be ousted from, and the relator inducted into, said office.

5. For such other and further relief in the premises as may be right. And for the costs of this action.

MACRAE & DAY,
Attorneys for Plaintiff's Relator.

NORTH CAROLINA, }
Burke County. }

John H. Pearson, being duly sworn before me, says: That he is the relator herein; that the facts set forth in the foregoing complaint are true, except as to those matters which are stated upon information, and as to them he believes it to be true.

JNO. H. PEARSON.

Sworn to and subscribed before me this 1st day of October, 1897.

M. SILVER,
Notary Public.

NORTH CAROLINA, }
Wake County. }

Superior Court, October Term, 1897.

THE STATE OF NORTH CAROLINA, by ZEB. V. WALSER, Attorney General, on the Relation of John H. Pearson, *v.* S. OTHO WILSON. } Answer.

The defendant, answering the complaint of the plaintiff, says:

1. That he admits to be true the facts alleged in the first section thereof.

2. That the allegations made in the second section are true, except that the defendant was elected railroad commissioner by the

General Assembly, at its session of 1895, for the term of six years from the first of April, 1895, to the first of April, 1901.

3. That section 3 of the complaint is admitted.

4. That section 4 of the complaint is denied. But defendant admits that the governor undertook, or attempted to suspend or remove the defendant from his said office of railroad commissioner, and designated the plaintiff's relator, John H. Pearson, to fill the vacancy which he had attempted to create.

5. That the allegations made in section five of plaintiff's complaint are not true. He admits that said Pearson has taken the oath prescribed by law for railroad commissioner.

6. That defendant admits section six of the complaint, except that he does not admit the appointment and qualification of said Pearson any further than he has hereinbefore admitted the same.

7. That he denies section seven of the complaint, but he admits that he refuses to vacate his office of railroad commissioner and to surrender the same to the relator. The defendant is advised that his suspension was illegal, and that he is still entitled to discharge the duties of his office.

22 8. That the facts alleged in section- eight and nine of plaintiff's complaint he admits to be true.

9. That the General Assembly of North Carolina, at its session of 1891, under the authority of the constitution of the State, articles 4, sections 2, 12 and 30, passed an act constituting a railroad commission, with the powers of a court, which was ratified the 5th of March, 1891, and under said act defendant was elected a member thereof at the session of 1895 for the term of six years, and on the 9th March, 1891, the General Assembly of North Carolina passed an act declaring "that the railroad commission elected at this session of the General Assembly, and their successors in office, be and they are hereby created and constituted a court of record, inferior to the supreme court, and shall be known as the board of railroad commissioners, and as such, shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects embraced in the act creating such railroad commission.

10. That the act ratified March 5th, 1891, in section 1 thereof provides, "That said commissioners shall not jointly or severally, or in any way, be the holder of any stock or bonds, or the agent or attorney or employee of any such company, or have any interest in any way in such company, and shall so continue during the term of his office; and in case any commissioner shall, as distributee or legatee, or in any other way, have or become entitled to any stock or bonds, or interest therein, of any such company, he shall at once dispose of the same, and in case any commissioner shall fail in this, or in case any one of them shall become disqualified to act, then it shall be the duty of the governor to suspend him from office, and to report the fact of his suspension, together with the reason therefor, to the next General Assembly, and the question of his removal from office shall be determined by a majority of the General Assembly in joint session. In any case of suspension the governor shall fill the vacancy, and if the General Assembly shall determine that the com-

missioner suspended shall be removed, then the appointee of the governor shall hold until his successor is elected and qualified, as hereinbefore provided; but if the General Assembly shall determine that the suspended commissioner shall not be removed from his office, then the effect shall be to reinstate him in said office. The person discharging the duties of said office shall be entitled to the salary for the time he is so engaged, but a commissioner who is suspended shall be allowed the salary during his suspension, in case he should be reinstated by the next General Assembly: Provided, that no person is eligible as such commissioner who shall have been an attorney of any such company within twelve months next preceding his election to such office." But the defendant avers, being so advised, that said provisions are unconstitutional and void.

11. That as appears by the complaint, the said Daniel L. Russell, governor, preferred the charges contained in his communication of August 24th, 1897, which *is* set out in section three of complaint. The defendant appeared before the said governor at the day fixed, and filed a written denial of said charges with affidavits in confirmation of said answer, as appears from section three of said complaint. And thereupon the defendant demanded of the said governor that the evidence against him be produced, and that he have an opportunity to confront his accusers and cross-examine the witnesses. This was refused, the governor stating that he had no power to subpœna witnesses.

12. That notwithstanding the denials of the defendant, and the affidavits in support thereof, the said governor, without evidence and without a trial, undertook to find generally that the defendant had violated the railroad commission law, in some of the particulars mentioned in his letter of August 24th, 1897, and that defendant had not only violated the said act in the specifications set out in said act, but that he had otherwise, within the meaning
23 and intent and words of said act, become disqualified to act. Thereupon, the said governor, without a more specific finding, undertook to suspend the defendant and deprive him of his said office.

13. That this defendant denies that he leased the Round Knob hotel, or had or has any interest therein; he further denies that he ever operated said property for his own pecuniary profit, and that the trains of the Southern railway are stopped there for meals in pursuance of any understanding, agreement or contract with him.

14. The defendant denies that he is or has been an agent or employee of the Southern Railway Company in violation of law.

15. The defendant denies that he has acquired any interest in any way in the Southern Railway Company in violation of law.

16. The defendant denies that he has become disqualified to act as a fair and impartial judge or commissioner, or that he has in any way become disqualified to act.

17. That under the laws of North Carolina the defendant has a property in his office, and he demands to have the charges preferred against him tried by a jury in this action.

18. That by the constitution of the State of North Carolina, arti-

cle 6, sections 1, 2 and 3, it is provided that every male person born in the United States, and every male person who has been naturalized, twenty-one years old or upward, who shall have resided in the State twelve months next preceding the election, and ninety days in the county in which he offers to vote, shall be deemed an elector and eligible to office, except all persons who shall deny the being of Almighty God, and all persons who shall have been convicted of treason, perjury or of any other infamous crime since becoming a citizen of the United States, or of corruption or malpractice in office, unless such person shall have been legally restored to the rights of citizenship.

19. That this defendant is in every way qualified to hold office under the requirements aforesaid.

20. That the defendant is advised, and so avers, that any provision of the railroad commission act, chapter 320, of the Acts of the General Assembly of North Carolina, passed at the session of 1891, which prescribed other and different qualifications for the office of railroad commissioner than those laid down by the said provisions of the constitution, are unconstitutional and void.

21. That the board of railroad commissioners is a court of record, and the commissioners are judges under and by virtue of article 4, section 12, of the constitution of the State by which it is provided: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government, but the General Assembly shall allot and distribute that portion of this power and jurisdiction, which does not pertain to the supreme court, among other courts prescribed in the constitution, or which may be established by law in such a manner as it may be deemed best, provide also a proper system of appeals, and regulate by law, when necessary, the method of proceeding, in the exercise of their powers, of all the courts below the supreme court, so far as the same may be done without conflict with other provisions of this constitution."

22. That by article 4, section 30, of the State constitution, it is further provided: "In case the General Assembly shall establish other courts inferior to the supreme court the presiding officers and clerks thereof shall be elected in such manner as the General Assembly may, from time to time, prescribe, and they shall hold their offices for a term not exceeding eight years."

23. That by article 4, section 31, of the State constitution, it is further provided: "Any judge of the supreme court, or of the
24 superior court, and the presiding officers of such courts inferior to the supreme court as may be established by law, may be removed from office for mental or physical inability upon a concurrent resolution of two-thirds of both houses of the General Assembly. The judge or presiding officer against whom the General Assembly may be about to proceed, shall receive notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the General Assembly shall act thereon."

24. That the alleged causes of removal set up by the governor are

such as apply to no other judges or presiding officers of courts in the State, and the governor has no power to remove or suspend any other judge or presiding officer of courts, or any other officer not appointed by him. Wherefore, the defendant says that the statute and the said action of the governor deprive him of the equal protection of the laws, and are in violation of the fourteenth amendment of the Constitution of the United States, and this defendant expressly claims the protection of said amendment.

25. That, as appears by section three of the complaint, the governor cited this defendant before him to answer the charges preferred against him; this defendant fully answered and generally and specially denied the charges. Thereupon the defendant demanded to be confronted with his accusers, and to hear and cross-examine the witnesses against him. This was refused, no evidence was produced, and thereafter the governor made his decision by which he attempted to suspend or remove the defendant till the meeting of the General Assembly early in January, 1899. The defendant submits that this action was without a hearing and without evidence to support it, without any trial and without any right of appeal; wherefore, he says, that the action was without due process of law and in direct conflict with the fourteenth amendment to the Constitution of the United States, and the defendant expressly claims the protection of said amendment.

26. That the defendant submits to the court whether, by the action of the governor aforesaid, the privileges and immunities of defendant as a citizen of the United States have been abridged, in violation of the fourteenth amendment to the Constitution of the United States, and he expressly claims the protection of said amendment.

27. That the defendant is advised that the General Assembly had no power to confer upon the governor the right of removal or suspension, nor to confer upon itself the power thereafter to pass upon the question of removal or restoration, nor to add to the qualifications for holding office. And the defendant further submits that the matters and things charged against him, and which he fully denies, do not come within the provisions of the act of General Assembly, and do not warrant the action of the governor.

28. The defendant submits, being so advised, that the action of the governor was illegal and void and the defendant is entitled to continue in the exercise of the duties of his office.

Wherefore the defendant prays judgment that he go without day and recover of the plaintiff his costs of action.

SPIER WHITAKER,
J. C. L. HARRIS,
R. O. BURTON,
Attorneys for Defendant.

WAKE COUNTY:

S. Otho Wilson, being duly sworn, says that the foregoing answer is true of his own knowledge, except as to those matters stated on

information and belief, and as to those matters, he believes it to be true.

S. OTHO WILSON.

Sworn to and subscribed before me this 15th day of October, 1897.
D. H. YOUNG, *C. S. C.*

25 NORTH CAROLINA, *Wake County.*

Superior Court, October Term, 1897.

THE STATE OF NORTH CAROLINA, by ZEBULON V. Walser, Attorney General, on the Relation of John H. Pearson, Railroad Commissioner,
v.
S. OTHO WILSON. } Judgment.

This cause, coming on for hearing, the plaintiff's attorneys, Messrs. MacRae & Day and A. C. Avery, moved for judgment on the complaint and answer. Thereupon, it is ordered, adjudged and decreed:

First. That the defendant has been lawfully suspended from his office of railroad commissioner.

Second. That the relator, John H. Pearson, has been duly appointed to fill the vacancy caused by the suspension of the defendant.

Third. That the defendant be ousted from, and the relator be inducted into, said office of railroad commissioner.

Fourth. That plaintiff recover the costs of this action, to be taxed by the clerk.

W. S. O'B. ROBINSON,
Judge Presiding.

Rule for new trial for errors alleged. Rule discharged. Exceptions by defendant. Judgment.

Appeal by S. Otho Wilson to supreme court. Notice of appeal accepted. Appeal bond fixed at $25. Supersedeas bond fixed at $100.

WAKE COUNTY:

In the Superior Court.

STATE OF NORTH CAROLINA, by Z. V. WALSER, Attorney General, on the Relation of John H. Pearson, Plaintiff,
against
S. OTHO WILSON, Defendant. } This 13th Day of November, 1897.

Whereas, on the 2d day of November, 1897, judgment was rendered in favor of the plaintiff and against the defendant in this action;

And whereas, the appellant intends to appeal from said judgment to the supreme court:

Now, therefore, we, S. Otho Wilson, of the county of Wake, and Jos. J. Rogers, undertake, pursuant to the statute, that the said appellant shall pay all costs and damages that may be awarded against him on such appeal, not exceeding twenty-five dollars.

S. OTHO WILSON.
JOS. J. ROGERS.

Justification of Sureties.

WAKE COUNTY, *sct:*

Jos. J. Rogers, above named, being duly sworn, says, that he is a resident of the State of North Carolina, and worth double the sum specified in the above undertaking, over all his debts and liabilities, and exclusive of property exempt from execution.

JOS. J. ROGERS.

Sworn and subscribed before me this 13th day of November, 1897.

D. H. YOUNG, *C. S. C.*

26 NORTH CAROLINA, *Wake County.*

Superior Court, October Term, 1897.

STATE OF NORTH CAROLINA, by ZEB. V. WALSER, Attorney General, on Relation of John H. Pearson,
against
S. OTHO WILSON.
} Statement of Case on Appeal.

Action in the nature of *quo warranto*, tried at October term, 1897, of Wake superior court, before Robinson, J.

At the conclusion of the reading of the pleadings, the defendant tendered the following issues and demanded a trial by jury :

1. Did the defendant lease the Round Knob hotel?
2. Had or has he any interest therein?
3. Has the defendant ever operated said property for his own pecuniary profit?
4. Are the trains of the Southern railway stopped at said hotel for meals in pursuance of any understanding, agreement or contract with him?
5. Is the defendant, or was he on the first of September, 1897, an agent or employee of the Southern Railway Company in violation of law?
6. Has the defendant acquired any interest in any way in the Southern Railway Company, in violation of law?
7. Has the defendant become disqualified to act as a fair or impartial judge or commissioner, or has he in any way become disqualified to act?
8. Did the defendant demand of the governor that he be confronted with his accusers, and that he have an opportunity to hear and cross-examine the witnesses against him?

9. Was said demand refused?

10. Was any evidence produced?

Exception 1. The court declined to submit these issues, or any issues, and the defendant excepted.

Exception 2. Thereupon the plaintiff moved for judgment upon the complaint and answer. Upon argument of this motion, the defendant, among other contentions, insisted that the Statute Laws of North Carolina, session of 1891, chapter 320, section 1, and the action of the governor set out in the pleadings, deprived him of the equal protection of the laws, and deprived him of his office without due process of law, as set out in the answer, and therefore said statute and action were in violation of the fourteenth amendment to the Constitution of the United States, and he expressly claimed the protection of said amendment. This contention was disallowed, and the defendant excepted.

Exception 3. The court ruled that the plaintiff was entitled to judgment upon the pleadings, and the defendant excepted.

Exception 4. Rule for a new trial for the foregoing alleged errors. Rule discharged. Defendant excepted.

Exception 5. Judgment as set out in the record. Defendant excepted, and appealed to the supreme court.

Notice given and accepted in open court. Appeal bond fixed at $25, and filed and approved. Supersedeas bond fixed at $100, and filed and approved.

SPIER WHITAKER,
J. C. L. HARRIS,
R. O. BURTON,
Attorneys for Defendant.

NORTH CAROLINA, }
Wake County. }

I, D. H. Young, clerk of the superior court of the county and State aforesaid, do hereby certify that the foregoing contains a full, true and perfect transcript of the record in the case of The State of North Carolina, by Z. V. Walser, attorney general, on the relation of John H. Pearson, railroad commissioner, against S. Otho Wilson.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in Raleigh, N. C., this 2 day of Dec., A. D. 1897.

[L. S.]

D. H. YOUNG,
Clerk Superior Court.

27 Entries of record.—Appeal docketed December 2, 1897; cause advanced under rule 13 and argued on December 4 with the case of Caldwell *vs.* Wilson, and the following opinion and judgment handed down on December 23, in the afternoon, about 4.30:

28 N. C. Supreme Court, Sept. Term, 1897, Wake Co.

STATE *ex Rel.* J. H. PEARSON
vs.
S. OTHO WILSON, Appellant. } # 160 "A."

R. O. Burton, Spier Whitaker, and J. C. L. Harris, for appellant. MacRae & Day and A. C. Avery, for appellee.

DOUGLAS, *J.*:

The facts in this case are substantially similar to those in Caldwell *vs.* Wilson, and the questions of law are identical. For the reasons given in that case the judgment in this case in the court below is affirmed, and judgment will be entered here that the relator Pearson is entitled to the office of railroad commissioner, now held by the defendant Wilson; that the defendant is not entitled thereto, and that he be ousted therefrom, and that the relator Pearson be placed in the possession of said office, with all its records and appurtenances thereunto rightfully belonging.

Affirmed.

Endorsed: 160 A. Pearson *v.* Otho Wilson. D. Wake.

29 *Judgment.*

This cause coming on to be heard in the supreme court and having been decided in favor or the plaintiff, it is adjudged and decreed:

1. That the defendant has been lawfully suspended from the office of railroad commissioner.

2. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant.

3. That the defendant be ousted from and the relator be inducted into said office of railroad commissioner.

Therefore let a writ issue out of this court, directed to the sheriff or other lawful officer of Wake county, commanding him to oust the defendant and put the relator in possession of the rooms occupied as offices by the railroad commissioners, in the Agricultural building, on Edenton street, in Raleigh, and known as the railroad commission offices, together with all property, paper, and effects appertaining or belonging to said offices.

That the plaintiff relator recover the costs of this action, to be taxed by the clerk of this court.

WALTER CLARK,
Justice Supreme Court.

30 *Entry of Record.*

At 5.30 p. m. on December 23 the plaintiff, through his counsel, William H. Day, obtained a writ of execution, directed to the sheriff of Wake county, in the following words:

(Title of Cause.)

Supreme Court of N. C., Fall Term, 1897.

The State of North Carolina to the sheriff of Wake county, Greeting:

Whereas in the above-entitled cause it was adjudged at this term that the defendant wrongfully withholds possession of the office of railroad commissioner from the plaintiff relator, and that plaintiff relator is entitled to the possession of the same, these are therefore to command you forthwith to put the relator in possession of the rooms occupied as offices by the railroad commissioners, in the Agricultural building, on Edenton street, and known as the railroad commission offices, together with all property, papers, and effects appertaining or belonging to said offices, and to oust the defendant from said office and to induct the plaintiff's relator into the same, and you shall make due return thereof on the first day of the next term of this court.

Witness this 23rd day of December, 1897.

By the court:

[L. S.] THOS. S. KENAN, *S. C. C.*

31 North Carolina Supreme Court, December 24, 1897.

The plaintiff, through his counsel, William H. Day, mowed (orally) in open court to set aside the supersedeas proceedings or adjudge them irregular, and the counsel for the defendant submitted the following motion:

To the honorable the supreme court of North Carolina:

The defendant respectfully shows to the court that judgment herein was rendered in the afternoon of Thursday, December 23, 1897; that execution thereon was issued by the clerk of this court to the sheriff of Wake county about 5.30 o'clock p. m. on the same day, but has not been executed; that the defendant's counsel sued out a writ of error to the Supreme Court of the United States, which was duly issued by the clerk of the United States circuit court for the eastern district of North Carolina and was allowed by the chief justice of this court on the same day; that the defendant also gave a good and sufficient bond in a penal sum fixed by his honor the chief justice, conditioned as a supersedeas bond, and he duly approved said bond and signed the citation; that at 7.10 o'clock p. m. the defendant's counsel filed said writ of error and bond in the clerk's office of this court, and at the same time lodged therein a copy of said writ of error for the State of North Carolina and a copy for John H. Pearson and a copy for Z. V. Walser, attorney general. The defendant submits to the court that the judgment of the court is superseded, and he respectfully asks that the said execution be recalled.

J. C. L. HARRIS,
R. O. BURTON,
SPIER WHITAKER,
For Defendant.

This 24th December, 1897.

On the same day, December 24, the following opinion was handed down:

32 CLARK, *J.*:

This is a motion by defendant to recall the execution which issued to put the relator in possession of the furniture, rooms, and other tangible property belonging to the railroad commission. The relator moved to set aside the supersedeas proceedings or adjudge them irregular. We are of opinion that we have no power to set aside the writ of error or pass upon the regularity thereof. We are also of opinion that the judgment of this court, *ex proprio vigore*, placed the relator in possession of the office at the time the judgment was filed. He having already qualified, no process was necessary for that purpose. He is in full possession of the same and entitled to exercise its duties and draw the salary thereto attached from the date of his appointment. The judgment took effect immediately upon being filed and is not superseded by the subsequent writ of error, regular or irregular. Foster *vs.* Kansas, 112 U. S., 201. The relator being in office by virtue of the judgment of this court, any attempt by the defendant to exercise its functions or to interfere with the full and free exercise thereof by the relator and any attempt by any one else to interfere, by alleged legal process or otherwise, unless and until the Supreme Court of the United States shall reverse the judgment of this court, will be a contempt of this court. We decline to make any order recalling the execution.

Both motions refused.

33 North Carolina Supreme Court.

I, Thomas S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true, and correct transcript of the action entitled State of North Carolina, by Zeb. V. Walser, attorney general, on relation of John H. Pearson, *against* S. Otho Wilson as appears of record in this court.

In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this 29th day of December, 1897.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

Endorsed on cover: Case No. 16,772. North Carolina supreme court. Term No., 559. S. Otho Wilson, plaintiff in error, *vs.* The State of North Carolina, by Zeb. V. Walser, attorney general, on the relation of John H. Pearson. Filed January 4th, 1898.